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No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The Refugee Act of 1980 requires an alien seeking asylum to demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42), 1158(a). The question presented is whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes persecution "on account of" that person's political opinion.

II

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of the case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	22
Appendix A	1a
Appendix B	26a
Appendix C	27a
Appendix D	34a
Appendix E	37a
Appendix F	39a
Appendix G	43a

TABLE OF AUTHORITIES

Cases:

Alonzo v. *INS*, 915 F.2d 546 (9th Cir. 1990)	16, 17
Alvarez-Flores v. *INS*, 909 F.2d 1 (1st Cir. 1990)	14
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	11, 19, 20
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983)	21
Fort Stewart Schools v. *FLRA*, 110 S. Ct. 2043 (1990)	20
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	6, 11, 17, 18, 20, 21
INS v. *Stevic*, 467 U.S. 407 (1984)	6
M.A. A26851062 v. *INS*, 899 F.2d 304 (4th Cir. 1990)	20
Maldonado-Cruz, In re, Interim Dec. 3041 (B.I.A. 1988)	13
Maldonado-Cruz v. *INS*, 883 F.2d 788 (9th Cir. 1989)	7, 13
Massachusetts v. *Morash*, 490 U.S. 107 (1989)	20
Mendoza Perez v. *INS*, 902 F.2d 760 (9th Cir. 1990)	19

Cases—Continued: Page

Pension Benefit Guaranty Corp. v. *LTV Corp.*, 110 S. Ct. 2668 (1990) 20
Perlera-Escobar v. *Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990) 8, 9, 10, 11, 12, 13, 19, 20
Sullivan v. *Everhart*, 110 S. Ct. 960 (1990) 20
Umanzor-Alvarado v. *INS*, 896 F.2d 14 (1st Cir. 1990) 14
Vigil, In re, Interim Dec. 3050 (B.I.A. 1988) 13

Treaties, constitution, statutes, and regulation:

United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 152..... 18
United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 19 U.S.T. 6225, T.I.A.S. No. 6577 18
International Refugee Organization Const., Annex 1, Pt. 1, 62 Stat. 3037:
§ A1(a)-(c), 62 Stat. 3049 18
§ A3, 62 Stat. 3049-3050 18
§ C1(a)(i), 62 Stat. 3050 18
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 20
§ 302, 104 Stat. 5030 20
§ 302(b)(1)(A), 104 Stat. 5031 (8 U.S.C. 1254a) 21
§ 302(b)(2)(B), 104 Stat. 5032 21
Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*:
§ 101(a)(42), 8 U.S.C. 1101(a)(42) 2, 43a
§ 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) ..2, 8, 14, 15, 43a
§ 208(a), 8 U.S.C. 1158(a) 2, 16, 44a
§ 209, 8 U.S.C. 1159 21
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 2
8 C.F.R. 208.13 16

Miscellaneous: Page

1988 Statistical Y.B. INS (Aug. 1989) 20
Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681 (1989) 15
S. Conf. Rep. No. 590, 96th Cong., 2d Sess. (1980).. 18
S. Rep. No. 256, 96th Cong., 1st Sess. (1979) 18

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The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals, App., *infra*, 5a-25a, is reported at 921 F.2d 844. The initial opinion of the court of appeals is reported at 908 F.2d 1452. The opinion of the Board of Immigration Appeals denying respondent's motion to reopen his deportation proceeding, App., *infra*, 27a-33a, is unreported. The opinion of the Board of Immigration Appeals denying respondent's motion for reconsideration of its dismissal of respondent's appeal, App., *infra*, 34a-36a, is unreported. The opinion of the Board of Immigration Appeals dismissing respond-

ent's appeal, App., *infra*, 37a-38a, is unreported. The oral opinion of the Immigration Judge, App., *infra*, 39a-42a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. A petition for rehearing was denied on January 10, 1991. App., *infra*, 26a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Refugee Act of 1980, added to the Immigration and Nationality Act of 1952 as Sections 101(a)(42) and 208(a) and codified at 8 U.S.C. 1101(a)(42) and 1158(a), are reproduced at App., *infra*, 43a-44a.

STATEMENT

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, limits eligibility for asylum to any alien the Attorney General determines to be "a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. 1158(a). A "refugee" is defined to be any person who is unwilling to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

Respondent Jairo Jonathan Elias Zacarias left his native Guatemala after two masked guerrillas armed with machine guns asked him to join their army and, when he declined to join, told him to "think it [over] well." App., *infra*, 6a-7a. In his deportation pro-

ceeding, respondent applied for asylum and withholding of deportation on the ground that the guerrillas' attempt to recruit him constituted persecution "on account of" his political opinion.

The Immigration Judge and the Board of Immigration Appeals denied the requested relief because the guerrillas did not threaten to harm respondent if he refused to join them, and because any implicit threat was not "on account of" his political opinion.

The Ninth Circuit reversed and found respondent eligible for asylum. It held that the Guatemalan guerrillas' practice of forcible recruitment made it reasonable for respondent to take the admonition to "think it [over] well" as a threat. App., *infra*, 17a. Moreover, that threat was "properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Id.* at 12a. On the basis of its conclusion that respondent was a "refugee" within the meaning of the 1980 Act, the court of appeals remanded for the BIA to determine whether respondent should be granted asylum. *Id.* at 25a.

1. Respondent is a nineteen-year-old man who left his native Guatemala in March 1987, a few months after two masked guerrillas came to his home. The guerrillas were armed with machine guns and asked respondent to join their army. Respondent refused to join, even though the guerrillas offered to pay him to fight for them. The guerrillas told respondent to "think it [over] well" and said that they would be back. Respondent remained at home and continued to work at his regular job for the next two months before he decided to leave Guatemala for the United States. App., *infra*, 6a-7a, 32a, 40a-41a; C.R. at 37.

monitor the state program to ensure that it continues to meet federal minimum standards (CWA § 402(c), 33 U.S.C. 1342(c)), and, after notification to the State, to enforce the terms of state-issued permits if the State has failed to institute enforcement actions of its own. CWA § 309(a), 33 U.S.C. 1319(a).

b. Two provisions in the CWA address federal amenability to suit. The State asserted in this litigation that each of those provisions constitutes an independent basis for claiming civil penalties against the federal government.

i. The federal facilities provision of the CWA, Section 313(a), 33 U.S.C. 1323(a), provides that federal facilities "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity * * *." Section 313(a) then adds that the above sentence "shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner."[2] Section 313(a) further provides, however, that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court."

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[2] Section 313(a) also adds that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law."

According to the State, the above provision generally waives federal sovereign immunity from assessment of civil penalties for violation of state water pollution statutes, provided that the civil penalties meet the requirement of the proviso—*i.e.*, that they "aris[e] under Federal law." Under Ohio Rev. Code Ann. § 6111.09 (Anderson Supp. 1987), "[a]ny person who violates [state water pollution regulations] shall pay a civil penalty of not more than ten thousand dollars per day of violation, to be paid into the state treasury to the credit of the general revenue fund."[3] The State asserts that this civil penalty provision can be said to "arise under" federal law, since it is part of the EPA-approved Ohio permit program. The State argues that the CWA federal facilities provision therefore waives federal sovereign immunity from assessment of civil penalties payable to the state treasury under Ohio Rev. Code § 6111.09.

ii. In addition to the federal facilities provision, the CWA's citizen suit provision, Section 505(a), 33 U.S.C. 1365(a), also addresses federal amenability to suit. See generally *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). Under Section 505(a), "any citizen may commence a civil action * * * against any person (including * * * the United States)" to enforce an effluent standard or limitation," which is defined by CWA Section 505(f), 33 U.S.C. 1365(f), to include

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[3] All references to Ohio Rev. Code § 6111.09 and to the penalty provision of the state hazardous waste act, Ohio Rev. Code § 3734.13(C), are to those provisions as they were when this lawsuit was filed. Although both provisions have since been amended, the changes are not significant for purposes of this case.

an NPDES permit, whether issued under federal or state law. The citizen suit provision thus includes the federal government among those entities that can be defendants in CWA citizen suits. Section 505(a) further provides that district courts shall have jurisdiction in such citizen suits to require compliance with an NPDES permit and to apply "any appropriate civil penalties" under the CWA's civil penalties provision, Section 309(d), 33 U.S.C. 1319(d). Section 309(d) itself provides for civil penalties payable to the United States for violations by any "person"—a term defined in CWA Section 502(5), 33 U.S.C. 1362(5), to refer to a list of entities that does not include the federal government.

The State asserts that CWA civil penalties against the federal government are "appropriate" under the citizen suit provision. CWA civil penalties may range up to $25,000 per day for each violation. CWA § 309(d), 33 U.S.C. 1319(d). Like any federal civil penalties and unlike the state penalties sought under the CWA's federal facilities provision, such federal civil penalties must be deposited into the federal treasury. See 31 U.S.C. 3302(b).

2. a. Originally enacted on October 21, 1976, RCRA, 42 U.S.C. 6901 *et seq.*, was the first federal effort to address the problem of solid waste generally, and hazardous waste specifically. In Subtitle C, 42 U.S.C. 6921 *et seq.*, RCRA creates a "cradle-to-grave" management system intended to ensure that hazardous wastes are safely treated, stored, and disposed of. Section 3004 of RCRA requires EPA to promulgate regulations establishing performance standards applicable to owners and operators of new and existing

treatment, storage, or disposal facilities as may be necessary to protect health and the environment. 42 U.S.C. 6924.

RCRA's permit system is administered in relevant respects much like that created by the CWA. Section 3005 of RCRA requires any facility that treats, stores, or disposes of hazardous waste to obtain a permit. 42 U.S.C. 6925. Section 3005(c) authorizes EPA or a State to issue such a permit only upon determining that the facility is in compliance with the standards promulgated by EPA under Section 3004. The statute provides that a State may issue and enforce hazardous waste management permits after it has applied to EPA to administer a hazardous waste program "in lieu of the Federal program," and EPA has authorized the program on the ground that it "is equivalent to the Federal program" and provides "adequate enforcement" of RCRA's requirements. RCRA § 3006(b), 42 U.S.C. 6926(b). A State may obtain interim EPA authorization for its hazardous waste program if the program is found to be "substantially equivalent" to the federal program.[4] Even after an approved state program has begun to function, EPA generally retains authority to monitor the state program to ensure that it continues to meet federal minimum standards (RCRA § 3006(e), 42 U.S.C. 6926(e)) and to enforce the terms of state-issued permits after notifying the State if the State has failed to institute enforcement actions of its own. RCRA § 3008(a), 42 U.S.C. 6928(a).

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[4] Ohio received interim authorization for its program on (July 15, 1983). 48 Fed. Reg. 32,345 (1983). However, EPA withdrew that authorization on January 31, 1986. 51 Fed. Reg. 4128 (1986).

b. Two provisions in RCRA address federal amenability to suit for violation of hazardous waste regulations. As with the CWA, the State asserted in this litigation that each of those provisions constitutes an independent basis for claiming civil penalties against the federal government.

i. The federal facilities provision of RCRA, Section 6001, 42 U.S.C. 6961, contains somewhat different language from the corresponding CWA provision. RCRA Section 6001 provides that facilities operated by the federal government "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting the control and abatement of hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements."

The State asserts that this provision simply waives federal sovereign immunity from assessment of civil penalties for hazardous waste violations, with no requirement that such civil penalties must "aris[e] under Federal law," as in the CWA. Ohio Rev. Code § 3734.13(C) provides that the state attorney general may bring an action for any violation of the state hazardous waste statutes and that in such an action "[t]he court may impose * * * a civil penalty of not more than ten thousand dollars for each day of each violation. * * * Moneys resulting from civil penalties imposed under [this provision] shall be paid into the hazardous waste clean-up fund" created elsewhere in the statute. 1985 Ohio Laws 2295. Therefore, the State argues, the RCRA federal facilities provision waives federal sovereign immunity from assessment

of civil penalties payable to the state hazardous waste clean-up fund under Ohio Rev. Code § 3734.13.

ii. RCRA's citizen suit and civil penalties provisions are very similar to the corresponding CWA provisions. Under RCRA's citizen suit provision, Section 7002(a), 42 U.S.C. 6972(a), "any person may commence a civil action * * * against any person (including * * * the United States * * *)" to enforce a "permit, standard, regulation, condition, requirement, prohibition, or order" under RCRA. Section 7002(a) further provides that district courts shall have jurisdiction in such citizen suits to require compliance with RCRA and to apply "any appropriate civil penalties" under RCRA's civil penalties provision, Section 3008(g), 42 U.S.C. 6928(g). Section 3008(g) itself provides for civil penalties payable "to the United States" for violations by any "person" —a term defined in RCRA Section 1004(15), 42 U.S.C. 6903(15), to refer to a list of entities that does not include the federal government.

The State asserts that civil penalties against the federal government are "appropriate" under the citizen suit provision. Such civil penalties may range up to $25,000 per day for each violation. RCRA § 3008(g), 42 U.S.C. 6928(g).

3. In this case, the State of Ohio filed suit in federal district court against DOE, the Secretary of Energy, and DOE's former private contractor, alleging that defendants had improperly treated, stored, and disposed of hazardous wastes and had improperly discharged pollutants and contaminants into waters at DOE's uranium processing plant in Fernald, Ohio. The State, relying on RCRA, the CWA, and state environmental laws, sought, *inter alia*, injunctive re-

lief and civil penalties against DOE under both state and federal law.[5]

In the district court, the United States moved to dismiss all claims for civil penalties as barred by the federal government's sovereign immunity. The court denied the motion, holding that federal sovereign immunity was waived under RCRA and the CWA as to both federal and state penalties. *Ohio* v. *United States Dep't of Energy*, 689 F. Supp. 760 (S.D. Ohio 1988). The parties subsequently entered into a consent decree settling the injunctive relief claims. See App., *infra*, 29a. C.A. App. 106-136. As part of the overall settlement, the parties stipulated (C.A. App. 137-142) to the amount of civil penalties to be paid—a potential total of $125,000 for water pollution violations and $125,000 for hazardous waste violations—if the United States does not prevail on appeal.

The district court certified (C.A. App. 105) an interlocutory appeal of the civil penalties issue under 28 U.S.C. 1292(b), and the Sixth Circuit granted the unopposed petition of the United States for permission to appeal. C.A. App. 157.

4. A divided panel of the Sixth Circuit affirmed the district court in part, holding that the federal facilities provision of the CWA does waive federal sovereign immunity from civil penalties assessed under Ohio Rev. Code § 6111.09 and payable to the state treasury, that the federal facilities provision of RCRA does not waive federal sovereign immunity

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[5] The State's complaint also contained two claims based on the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* Pursuant to the settlement agreement between the parties discussed below, one of the CERCLA claims was dismissed and the other was stayed. App., *infra*, 29a; C.A. App. 127.

from civil penalties under Ohio Rev. Code § 3734.13 (C), and that the citizen suit provision of RCRA does waive federal sovereign immunity from civil penalties payable to the federal treasury under RCRA's own civil penalties provision. The court did not reach the State's contention that the citizen suit provision of the CWA, like the citizen suit provision of RCRA, waives federal sovereign immunity from civil penalties under federal law.[6]

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[6] The court of appeals held that it "need not consider" the State's "alternative argument" based on the CWA's citizen suit provision, (App., *infra*, 8a), although the district court had reached that issue and held that the CWA citizen suit provision waived federal sovereign immunity from civil penalties assessed under the CWA itself (App., *infra*, 42a-43a). Although the court of appeals did not elaborate on its reasons for not reaching this issue, the stipulation between the parties deprived the controversy over federal penalties of any significance once the court of appeals had decided that the federal government was liable for civil penalties under state law. The stipulation provided for payment of a maximum of $125,000 in CWA civil penalties under either state or federal law. C.A. App. 139. It also expressly provided for payment in that amount to the state treasury if state penalties were held permissible (C.A. App. 140-141), and to the federal treasury if state penalties were held impermissible but federal penalties were held permissible (C.A. App. 141). Thus, once it was determined that state penalties were permissible, the stipulation rendered it unnecessary to consider whether federal penalties were permissible as well. We note, however, that the RCRA citizen suit and penalty provisions are quite similar in relevant respects to those of the CWA. Accordingly, resolution of the question whether the RCRA citizen suit provision waives federal sovereign immunity from civil penalties (the second question presented in this petition) would provide substantial guidance in resolving the corresponding issue under the CWA.

a. With respect to the CWA, the court found that sovereign immunity was waived by Section 313 for penalties "arising under federal law." App., *infra*, 4a-6a. The court then addressed the question whether immunity for civil penalties under Ohio Rev. Code § 6111.09 was waived and found that immunity from such state civil penalties was waived because they "arise under" federal law. The panel reasoned (App., *infra*, 7a):

> Once a state water pollution law is approved, compliance with the state law *is* compliance with the Clean Water Act. 33 U.S.C. § 1342(k). Thus, under the terms of the Clean Water Act, a qualifying state water pollution law, including its civil penalties, arises under federal law.

Judge Guy dissented as to the panel's holdings concerning both the CWA and RCRA. App., *infra*, 16a-27a. With respect to the CWA, he agreed with the majority (App., *infra*, 19a-20a) that the federal facilities provision of the CWA, Section 313(a), waives sovereign immunity for civil penalties arising under federal—but not state—law. However, in determining which civil penalties arise under federal law, Judge Guy agreed with the Ninth Circuit's decision in *California* v. *Department of the Navy*, 845 F.2d 222 (1988), that a state's EPA-approved permit program and penalties assessed thereunder do not "arise under Federal law." App., *infra*, 22a-24a. He based this conclusion on the explicit statutory recognition that a state "administer[s] *its own* permit program * * * upon approval of the program by [the] EPA." App., *infra*, 22a (quoting 33 U.S.C. 1342(b) (emphasis supplied)). He also relied on statements in the statute's legislative history that state permit programs "function[] in lieu of the Federal pro-

gram." App., *infra*, 23a (quoting H.R. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977)).

b. With respect to RCRA, the court unanimously rejected the district court's conclusion that the federal facilities provision waives the federal government's sovereign immunity from state or federal civil penalties. App., *infra*, 9a-12a, 17a n.1 (Guy, J., dissenting). The court held that Congress did not waive sovereign immunity from state or federal civil penalties under the federal facilities provision of the Act, RCRA Section 6001, 42 U.S.C. 6961, because, unlike the CWA, RCRA does not specifically mention "sanctions" in its waiver provision. The court also observed that although RCRA Section 6001, 42 U.S.C. 6961, explicitly discusses injunctive relief twice, it never mentions monetary relief or civil penalties. In holding that any waiver of sovereign immunity from civil penalties in Section 6001 "is not stated clearly enough to be recognized" (App., *infra*, 10a), the Sixth Circuit agreed with the Ninth Circuit in *United States* v. *Washington*, 872 F.2d 874 (1989), and the Tenth Circuit in *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293 (1990).

The panel majority did, however, find that RCRA's citizen suit provision constituted a waiver of federal immunity from civil penalties assessed under RCRA's own civil penalties provision.[7] The majority stated (App., *infra*, 15a) that the "fairest reading" of RCRA Section 7002, 42 U.S.C. 6972, subjects the United States to the application of "appropriate"

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[7] In *Washington*, the Ninth Circuit declined to rule on whether the citizen suit provision of RCRA constituted a waiver of sovereign immunity, explaining that the issue was not properly before the court. 872 F.2d at 880-881. The issue also was not raised or decided in *Mitzelfelt*.

civil penalties because it generally authorizes suits against the United States. The court rejected (App., *infra*, 14a-15a) the United States' argument that, although civil penalties are "appropriate" against other entities, they are never "appropriate" when levied against the federal government. In addition, the majority stated, RCRA's legislative history demonstrates that Congress intended to subject the United States to civil penalties in citizen suits. *Id.* at 15a-16a.

Judge Guy disagreed with the majority's conclusion that the citizen suit provision of RCRA authorizes civil penalties against the United States. Judge Guy found that, under the citizen suit provision's express language, "judicial authority to impose civil penalties in response to RCRA citizen suits is limited to sanctions permitted under 42 U.S.C. §§ 6928(a) and (g)." App., *infra*, 25a. Because the United States is excluded from RCRA's general definition of "person[s]" against whom civil penalties may be levied under those Sections, the reference in the citizen suit provision to those Sections precludes assessment of civil penalties against the United States. App., *infra*, 25a-26a. He also noted that the exclusion of the United States from those entities subject to civil penalties is "entirely logical" because the penalties assessed under RCRA are payable "to the United States." App., *infra*, 26a n.4 (quoting 42 U.S.C. 6928(g)). He concluded that RCRA waives sovereign immunity only to the extent that it permits states to seek declaratory and injunctive relief. App., *infra*, 26a.

REASONS FOR GRANTING THE PETITION

1. Under settled legal principles, a waiver of sovereign immunity by the federal government must be unequivocally expressed and may not be implied, assumed, or based on speculation or ambiguity. *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *King*, 395 U.S. 1, 4 (1969). Any asserted waiver of the United States' immunity to suit—especially in matters affecting the federal fisc, see *Lehman* v. *Nakshian*, 453 U.S. 156, 161 & n.8 (1981)—must be construed "strictly in favor of the sovereign" and "not enlarge[d] * * * beyond what the language requires." *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (citation omitted); accord *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). As in other contexts, asserted waivers of sovereign immunity in federal environmental statutes must be "clear and unambiguous." *Hancock* v. *Train*, 426 U.S. 167, 179 (1976); *EPA* v. *California*, 426 U.S. 200, 211 (1976).

In *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554 (1921), the Court held that a statute waiving sovereign immunity in terms similar to those in the CWA and RCRA was insufficient to waive federal immunity to fines and penalties. The statute at issue provided that rail carriers "while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law." 256 U.S. at 558. Justice Brandeis, writing for a unanimous Court, noted that "the element of punishment clearly predominates" with respect to the penalties sought (256 U.S. at 565) and consequently held that—notwithstanding the general terms used in the statute—"Congress has not

given its consent that suits of this character be brought against the United States." *Ibid.*

2. The Sixth Circuit departed from these settled principles in holding that Congress has waived federal sovereign immunity from civil penalties payable to the State in the CWA and has waived federal sovereign immunity from payment of civil penalties to the federal treasury in RCRA. The Sixth Circuit's decision with respect to the CWA directly conflicts with the decision of the Ninth Circuit in *California* v. *Department of the Navy*, 845 F.2d 222 (1988), thus creating an inconsistent regime in which the ability of a State to obtain civil penalties from the federal government depends on the accident of its location. Such inconsistency has the potential to skew incentives for both the States and the federal government. It can encourage efforts by "favored" States to obtain federal funds through civil penalties not available to other States. At the same time, it will tend to press the federal government to direct resources available for environmental clean-up efforts to sites in States with the greatest potential threat of civil penalties, rather than to those sites that most urgently require action.

The Sixth Circuit similarly erred in holding that, although Congress did not waive federal sovereign immunity from civil penalties in the RCRA provision that specifically addresses federal facilities, it did do so—at least as to penalties assessed under federal law—in the provision generally authorizing citizen suits against public or private entities. That holding once again departs from settled legal principles requiring narrow construction of waivers of sovereign immunity. Although no other court of appeals has addressed the particular question whether the RCRA

citizen suit provision constitutes a waiver of sovereign immunity from civil penalties, the Sixth Circuit's result differs from the result reached by the Ninth and Tenth Circuit in holdings that civil penalties are not available under the federal facilities provision of RCRA. Moreover, the Sixth Circuit's holding that the federal government must pay civil penalties to itself is illogical and unsupported by RCRA's legislative history. As with the CWA, adding civil penalties to the concededly proper injunctive remedies that Congress has authorized threatens to impede the federal government's ability to advance environmental compliance and cleanup efforts in a rational manner by allocating resources on the basis of environmental needs, rather than on the basis of which state has the most active litigants.

In short, this case presents closely related issues that arise under similar, but not identical, federal environmental statutes.[8] The amenability of the federal government to civil penalties under both statutes has been extensively litigated in the lower federal courts, resulting in a direct circuit conflict with respect to the CWA and a disparate array of district court decisions with respect to both statutes. The court of appeals erred in failing to recognize that the language of both statutes most reasonably can—and therefore, in light of settled principles of sovereign immunity, should—be read to reflect a congressional intent to subject the federal government to judicial enforcement of the statutes by means of prospective,

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[8] In addition, provisions that correspond to the citizen suit and federal facilities provisions of the CWA and RCRA can be found in the Safe Drinking Water Act, 42 U.S.C. 300j-8 (citizen suit), 42 U.S.C. 300j-6 (federal facilities), and the Clean Air Act, 42 U.S.C. 7604(a) (citizen suit), 42 U.S.C. 7418(a) (federal facilities).

injunctive relief, but not to penalize the federal government by imposition of civil penalties for past failures. Because both the federal government and the States have a substantial interest in uniform nationwide standards governing federal liability for civil penalties in environmental litigation, review of the Sixth Circuit's decision by this Court is warranted.

3. *CWA.* The court of appeals made two distinct errors in concluding that the federal facilities provision of the CWA waives federal sovereign immunity from state-law civil penalties. First, the court began its analysis by mistakenly holding that the federal facilities provision, which concededly waives federal sovereign immunity for some purposes, supplies a sufficiently clear waiver of federal sovereign immunity *from civil penalties.* Second, the court compounded its error by holding, in square conflict with *California* v. *Department of the Navy*, 845 F.2d 222 (9th Cir. 1988), that "practically speaking, actions under a qualifying state water pollution law arise under federal law" (App., *infra*, 7a) and therefore satisfy the "arising under Federal law" requirement of the federal facilities provision.

a. Section 313(a) of the CWA does not in "clear and unambiguous" (*Hancock* v *Train*, 426 U.S. at 179) terms waive the federal government's sovereign immunity from civil penalties. The first sentence of the provision refers to three types of regulation to which federal facilities are subject: "all * * * requirements," "administrative authority," and "process and sanctions." The second sentence elaborates on each of these categories, to make clear that "requirements" refers to "any requirement whether substantive or procedural"; that "administrative authority" includes such authority exercised by any level of government; and that "process and sanc-

tions" refers to "any process and sanction whether enforced in Federal, State, or local courts or in any other manner." Nowhere in this explication of the statute's terms is any mention made of either "civil penalties" or "penalties."

The court of appeals' interpretation of the above language blurs the three distinct statutory categories The court held that Section 313(a) subjects federal facilities to "'any requirement,' including 'sanctions,'"[9] and goes on to "specifically state[] that sovereign immunity is waived for *any* sanction." App, *infra*, 4a-5a. Yet the statute demonstrably does not include "sanctions" among "requirements"; the waiver as to "requirements" is in a threefold list that includes "sanctions" in a distinct and coordinate category. Furthermore, "sanctions" are not themselves a separate statutory category. Rather, the term "sanction" is used twice in the statute, each time coupled in the phrase "process and sanctions" (or "any process and sanction"). Thus, the clear import of the statutory language is that "process and sanctions" is a single category, coordinate to "requirements," as to which Congress intended to waive sovereign immunity.

Neither "requirements" nor "process and sanctions" are readily understood to include civil penalties. The term "all requirements" is most naturally read to refer to regulations that govern the primary conduct of those who operate federal facilities, not to civil or criminal penalties to be imposed when the federal facilities cannot or do not comply with those

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[9] The court later similarly asserted that the term "all requirements" includes "process and sanctions." App., *infra*, 6a.

requirements.[10] See *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990) (interpreting RCRA); *California* v. *Walters*, 751 F.2d 977, 978 (9th Cir. 1984) (same). Similarly, the term "process and sanctions" has a tolerably clear legal meaning, referring to judicial procedures and mechanisms by which courts protect their jurisdiction and compel compliance with equitable decrees. By waiving sovereign immunity for "process and sanctions" Congress clearly intended to subject federal facilities to judicial process, including sanctions to compel compliance with judicial process. There is no reason to believe, however, that Congress intended as well to take the extraordinary step of subjecting the federal government to civil penalties payable to a "subordinate sovereign" and decreed by that sovereign's laws. *Hancock* v. *Train*, 426 U.S. at 179. And, in any event, no such intent is unambiguously stated.

b. As the court of appeals correctly stated, the proviso to Section 313(a) "explicitly limits [Section 313(a)'s] waiver of sovereign immunity for civil penalties to those 'arising under federal law.'" App., *infra*, 6a.[11] In this case, the State of Ohio relied on

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[10] Indeed, on brief in the court of appeals, the State itself relied entirely on the "process and sanctions" clause of Section 313, not the "requirements" clause. Resp. C.A. Br. 18-25.

[11] The court of appeals relied on the proviso's apparent presupposition that some *other* language in the statute waives sovereign immunity from at least some civil penalties in holding that the "process and sanction" language accomplishes such a waiver. App., *infra*, 6a. Yet the proviso itself is at best a limitation on a waiver and not a waiver itself. As such, the proviso could not provide the kind of "clear and unambiguous" language that is otherwise absent from the express terms of the balance of Section 313(a).

a state statute, Ohio Rev. Code Ann. § 6111.09 (Anderson 1987), as authority for the imposition of civil penalties on the United States payable to the state treasury. Because civil penalties assessed under Ohio Rev. Code § 6111.09 do not in any sense arise under federal law, the Sixth Circuit's holding that Section 313(a) waives federal sovereign immunity as to such civil penalties is erroneous.

i. The court of appeals' holding is in direct conflict with the holding of the Ninth Circuit in *California* v. *Department of the Navy*, 845 F.2d 222, 225 (9th Cir. 1988).[12] In *California*, as here, the State sought to impose civil penalties pursuant to state law on a federal facility that had allegedly violated a state water pollution discharge permit. 845 F.2d at 223. As in this case, the state permit program had been approved by the EPA, and the State pointed out that such approval is conditioned in part on a showing that the State had adequate authority "to abate violations of the permit program, including civil and criminal penalties" under CWA Section 402(b)(7), 33 U.S.C. 1342(b)(7). See 845 F.2d at 225. As here, the State argued that, in light of the EPA approval, the state civil penalty provisions could be said to arise under federal law for purposes of the Section 313(a) proviso.

The Ninth Circuit squarely rejected the State's argument as "neither supported by the structure of the CWA nor its legislative history." 845 F.2d at 225. The court noted that the language of the CWA itself

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[12] See also *McClellan Ecological Seepage Situation (MESS)* v. *Weinberger*, 655 F. Supp. 601, 604-605 (E.D. Cal. 1986) (no waiver of sovereign immunity from state civil penalties); but cf. *Metropolitan Sanitary Dist.* v. *Navy*, 722 F. Supp. 1565, 1571-1572 (1989), on reconsideration, 737 F. Supp. 51 (N.D. Ill. 1990).

refers to the fact that an approved state permit program is administered under state law. 845 F.2d at 225. For example, CWA § 402(b), 33 U.S.C. 1342(b), requires a State seeking EPA approval of a state permit program to submit "a full and complete description of the program it proposes to establish and administer *under State law*" (emphasis added).[13] The Ninth Circuit also noted that the CWA's legislative history "clearly states that state permit programs are 'not a delegation of Federal authority,' but instead are state programs which 'function[] in lieu of the Federal program." 845 F.2d at 225 (quoting H.R. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977).[14] Because the State's argument would "essentially nullify § 313(a)'s express limitation of civil penalties against federal agencies to those arising under federal law" (845 F.2d at 225), the Ninth Circuit "decline[d] the invitation to find a Congressional waiver of sovereign immunity without finding the requisite explicit Congressional intent." *Ibid.* In arriving at its contrary conclusion,

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[13] Section 402(b) also requires a state seeking to run its own permit program to demonstrate to the EPA "that the laws *of such state* * * * provide adequate authority to carry out the described program." 33 U.S.C. 1342(b) (emphasis added). See also CWA § 101(b), 33 U.S.C. 1251(b) (recognition that states retain "primary responsibilities * * * to prevent, reduce, and eliminate pollution").

[14] See also 118 Cong. Rec. 33,761 (1972) (Rep. Wright) (stating that, if EPA approves state program, state may issue permits "under State law" and that such permits would be "State, not Federal actions"); H.R. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977) (emphasizing that state permits are issued "under state law," and that an EPA-approved state program "functions in lieu of the Federal program" and "does not involve a delegation of Federal authority").

the majority in this case did not mention or attempt to distinguish the Ninth Circuit's decision in *California* v. *Department of the Navy*.[15]

ii. The Sixth Circuit's holding that civil penalties assessed under state law arise under federal law is mistaken. The complaint in this case sought an order that the United States shall "pursuant to Ohio Revised Code Section 6111.09 * * * pay into the [Ohio] treasury a civil penalty for each violation of Ohio Revised Code Chapter 6111." C.A. App. 52. Moreover, the section of the complaint entitled "Jurisdiction" alleged that "[t]he Court has pendent jurisdiction over the claims asserted under the laws of the State of Ohio." C.A. App. 10.[16] These allegations reflected the State's own recognition that the state civil penalties at issue arise under state law.[17]

Moreover, the law governing the assessment of civil penalties in this case is entirely state law. The question whether penalties should be assessed and, if so, in what amount and to whom they are to be paid are solely questions of state law.[18] Cf. *Smith* v.

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[15] Judge Guy's dissenting opinion did cite *California* v. *Department of the Navy*. See App., *infra*, 23a-24a.

[16] See also Resp. C.A. Br. 26 (Water pollution counts in the complaint "contain pendent state claims for civil penalties under Ohio Revised Code Section 6111.09.").

[17] Indeed, by invoking pendent jurisdiction for its state-law penalty claims, the State apparently indicated its belief that there was no independent basis for federal jurisdiction over such claims—*i.e.*, unlike the claims for federal civil penalties, the claims for state civil penalties do not "aris[e] under" federal law. 28 U.S.C. 1331.

[18] To be sure, Ohio may choose to borrow federal standards for assessing civil penalties under CWA 309(d), 33 U.S.C. 1319(d), to govern some of these issues. See, *e.g.*, *State* v. *Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 157, 438 N.E.2d

Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921); see also *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action."). Because the Ohio legislature, not the United States Congress, enacted the statute that creates the right to civil penalties at issue here, that right arises under Ohio, not federal, law.

In concluding that civil penalties assessed under Ohio Rev. Code § 6111.09 arise under federal law, the Sixth Circuit relied heavily (App., *infra*, 6a-8a) on the fact that state permit programs must be reviewed and approved by EPA in accordance with federal minimum standards before they are allowed to supplant the EPA permit program. But EPA approval of a state scheme cannot convert civil penalties assessed under that scheme into penalties that arise under federal law. Because entities in Ohio are generally required *under state law* to comply with the state statutory scheme regardless of whether the scheme receives EPA approval, such approval does not alter any obligations imposed under state law. Although EPA approval does eliminate the need for Ohio entities to obtain federal, as well as state, permits, that effect merely demonstrates that Congress chose to limit—not expand—the role of federal law

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120, 125 (1982) (using EPA's civil penalty policy to decide upon size of civil penalty under state law). Yet that choice has no bearing on whether a question of state or federal law is involved. Moreover, it is clear that many issues will be resolved in substantially different ways under state or federal law. For example, the maximum federal penalty permitted under the CWA Section 309(d), 33 U.S.C. 1319(d), is $25,000 per day for each violation; the maximum daily penalty under Ohio Rev. Code Ann. § 6111.09 (Anderson Supp. 1987) is $10,000.

where state law adequately protects against water pollution.

At most, it could be argued that the federal statute is ambiguous concerning whether penalties imposed under a federally approved state program should be considered penalties arising "under federal law." But it is fundamental that any such ambiguity must be resolved against, rather than in favor of, a waiver of sovereign immunity (see pp. 15-16, *supra*).

4. *RCRA* Aside from a single district court decision now pending appeal, every court that has addressed the issue has agreed with the Sixth Circuit's holding that the federal facilities provision of RCRA, Section 6001, 42 U.S.C. 6961, does not waive federal sovereign immunity from civil penalties. See *United States* v. *Washington*, 872 F.2d 874 (9th Cir. 1989); *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990); *McClellan Ecological Seepage Situation (MESS)* v. *Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986); *Florida Dep't of Envtl. Regulation* v. *Silvex Corp.*, 606 F. Supp. 159 (M.D. Fla. 1985); *Meyer* v. *United States Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986); cf. *California* v. *Walters*, 751 F.2d 977 (9th Cir. 1984) (criminal penalties). But see *Maine* v. *Department of the Navy*, 702 F. Supp. 322 (D. Me. 1988), appeal pending, No. 86-0211P (1st Cir.).[19] That conclusion follows from the language of RCRA Section 6001, which differs from the language of CWA Section 313(a) in making explicit that the "sanctions" as to which immunity is waived are "such sanctions as may be imposed by a court to enforce [injunctive]

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[19] Cf. *Alabama* v. *Veterans Administration*, 648 F. Supp. 1208, 1210-1211 (M.D. Ala. 1986) (interpreting federal facilities provision of Clean Air Act).

relief," and in omitting any express reference whatever—even in a limiting proviso—to civil penalties. As the court of appeals recognized, the differences between CWA Section 313(a) and RCRA Section 6961 reinforce the conclusion that no waiver as to civil penalties was intended in the latter provision. See App., *infra*, 11a-12a.

The Sixth Circuit erred, however, in holding that Congress waived federal sovereign immunity from civil penalties in RCRA's citizen suit provision, Section 7002(a), 42 U.S.C. 6972(a). The key statutory language on which the court relied was that which includes "the United States" among the entities that are subject to suit, which is coupled with the provision that, in addition to enjoining violations and ordering compliance, "[t]he district court shall have jurisdiction * * * to apply any appropriate civil penalties under section 6928(a) and (g) [the civil penalty provisions] of this title." Relying primarily on statements in the legislative history of RCRA (see App., *infra*, 15a) and the "underlying congressional policy * * * to eliminate the unsafe disposal of hazardous wastes" by federal facilities (App., *infra*, 15a-16a), the Sixth Circuit held that "[t]he fairest reading" of the above language "includes the United States in the application of civil penalties." App., *infra*, 15a.

The Sixth Circuit's conclusion that Congress intended to waive federal sovereign immunity from civil penalties in the citizen suit provision is mistaken. The word "appropriate" qualifies the phrase "civil penalties under [RCRA Section 3008(g), 42 U.S.C. 6928(g)]." [20] By including that qualification,

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[20] Section 7002(a) authorizes a district court in a citizen suit to assess civil penalties under 42 U.S.C. 6928(a), as well

Congress plainly intended to limit the applicability of such penalties, not to expand the number of entities otherwise subject to them. RCRA Section 3008(g), 42 U.S.C. 6928(g), authorizes civil penalties against "[a]ny person who violates any requirement" of RCRA. Since the United States is not a "person" for purposes of RCRA (see RCRA Section 1004(15), 42 U.S.C. 6903(15)), it is never "appropriate" to assess civil penalties against the United States under RCRA Section 3008(g). Therefore, although the citizen suit provision plainly authorizes civil penalties where "appropriate"—*i.e.*, against parties other than the federal government who meet the other requirements for such penalties—it equally plainly prohibits such penalties where not "appropriate"—*i.e* , against federal defendants.

Even if the language of the statute were less clear, the Sixth Circuit's conclusion would be implausible. Initially, it would have been illogical for Congress to refrain from waiving federal sovereign immunity from civil penalties in the federal facilities provision of the Act—the provision specifically addressing the extent to which the federal government is subject to RCRA—but then to undo the limitations of its carefully-crafted waiver of sovereign immunity in the more broadly applicable citizen suit provision. Moreover, the civil penalties available under the citizen suit provision in a suit against any entity—state, local, or private—are those assessed under RCRA's civil penalty provisions; therefore, they are necessarily *federal* civil penalties payable to the federal

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as 42 U.S.C. 6928(g). Because RCRA Section 3008(a), 42 U.S.C. 6928(a), authorizes civil penalties in EPA-initiated enforcement actions, that provision is inapplicable in this case.

treasury. The civil penalties that the State seeks would consequently simply be transferred from one account in the federal treasury to another; surely it should not be assumed absent some more explicit statement that Congress thus intended such a shift in funds amongst Treasury accounts through a procedure outside congressional control.[21]

The majority's bald assertion that the "fairest reading" of Section 6972 includes the United States in the application of civil penalties misapprehends the most plausible reading of the statute and disregards controlling principles of statutory interpretation regarding waivers of sovereign immunity by resolving a statutory ambiguity in favor of a waiver. Because the Sixth Circuit's decision also threatens to upset the careful balance Congress drew with respect to environmental litigation concerning federal facilities, and because the related RCRA and CWA issues in this case are profitably considered together, review by this Court is warranted.

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[21] In 1979, the Department of Justice sought a ruling from the Comptroller General as to whether federal civil penalties under an analogous provision of the Clean Air Act would be payable from the permanent indefinite appropriation available for satisfaction of judgments against the federal government (see 28 U.S.C. 2414; 31 U.S.C. 724a) or from appropriations available to the defendant agency. The Comptroller General determined that the source of funds depends on whether the agency contests its liability for the penalty (in which case payment could come from the judgment fund) or concedes such liability (in which case the payment must come from program funds). 58 Comp. Gen. 667 (1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 89-3329

STATE OF OHIO, ANTHONY J. CELEBREEZE, JR., ATTORNEY GENERAL, PLAINTIFFS-APPELLEES

v.

U.S. DEPARTMENT OF ENERGY, DEFENDANT-APPELLANT

JOHN S. HERRINGTON, SECRETARY OF ENERGY; NLO, INC.; NL INDUSTRIES, INC., DEFENDANTS

Argued Dec. 7, 1989

Decided June 11, 1990

Before MARTIN, JONES and GUY, Circuit Judges.

BOYCE F. MARTIN, Jr., Circuit Judge.

This interlocutory appeal requires us to determine whether the United States has waived its sovereign immunity for actions for civil damages under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1251 *et seq.* We affirm the district court's decision

that sovereign immunity was waived under both statutes.

The United States Department of Energy owns a 1,050 acre uranium processing plant in Fernald, Ohio that is operated under a management contract by private contractors. The Fernald facility processes uranium for the production of nuclear weapons. The Fernald facility does not have a nuclear reactor, but processes performed there generate both radioactive and non-radioactive hazardous wastes.

In March 1986, the State of Ohio filed this action against the Department of Energy, the Secretary of the Department of Energy, and its private contractors, seeking civil penalties and other relief. The State of Ohio alleges that the defendants improperly disposed of hazardous wastes, released radioactive materials into the environment, and polluted surface and ground water. The State of Ohio grounds its claims primarily in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, the Ohio Solid & Hazardous Waste Control Act, Ohio Rev.Code § 3734, and the Ohio Water Pollution Control Act, Ohio Rev.Code § 6111.

The Department of Energy moved to dismiss the claims for civil penalties as barred by sovereign immunity. The district court denied this motion, holding that sovereign immunity was waived under the Resource Conservation and Recovery Act and the Clean Water Act. The district court certified its decision for immediate appeal because the decision involves a controlling question of law and immediate appeal may advance the ultimate resolution of the

litigation. 28 U.S.C. § 1292(b). We exercised our discretion to hear this interlocutory appeal on whether sovereign immunity was waived. *Id.*

A waiver of sovereign immunity must be clear, express, and unambiguous; it cannot be implied from vague language. *Block v. North Dakota*, 461 U.S. 273, 280, 103 S.Ct. 1811, 1816, 75 L.Ed.2d 840 (1983); *Hancock v. Train*, 426 U.S. 167, 187, 96 S.Ct. 2006, 2016, 48 L.Ed.2d 555 (1976) (applied to environmental law). In determining whether a waiver is clear, the controlling factor is the "underlying congressional policy." *Franchise Tax Bd. v. U.S. Postal Service*, 467 U.S. 512, 521, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984). We must avoid the temptation to seek any hint of ambiguity that can be used to twist the statute into denying sovereign immunity. *See id.* When Congress enacts a clear waiver, that waiver should not be "thwarted by an unduly restrictive interpretation" in the courts. *Canadian Aviator v. United States*, 324 U.S. 215, 65 S.Ct. 639, 89 L.Ed. 901 (1945).

I. *The Clean Water Act*

We first address whether Congress waived sovereign immunity in the Clean Water Act, 33 U.S.C. § 1323, for claims brought by the State of Ohio under the Clean Water Act and Ohio Water Pollution law. Section 1323 states:

> (a) *Each department*, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants and each officer, agent, or employee thereof in the

> performance of his official duties, *shall be subject to, and comply with, all Federal, State, interstate, and local requirements*, administrative authority, and process *and sanctions* respecting the control and abatement of water pollution in the same manner, and *to the same extent as any nongovernmental entity* including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) *to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers*, agents, or employees under any law or rule of law. . . .
>
> No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and *the United States shall be liable only for those civil penalties arising under Federal law* or imposed by a State or local court to enforce an order or the process of such court. . . .

33 U.S.C. § 1323 (emphasis added). This statutory language should be interpreted according to its ordinary usage. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 n. 20, 96 S.Ct. 1375, 1384 n. 20, 47 L.Ed.2d 668 (1976). The first sentence of section 1323 subjects the Department of Energy to "any requirement," including "sanctions," to the same extent as a private entity under the Act. Subsection C

specifically states that sovereign immunity is waived for *any* sanction. Any reader would interpret this statement to subject the Department of Energy to civil penalties. In addition, the Oxford English Dictionary defines "sanction" as "[t]he *specific penalty* enacted in order to enforce obedience to the law." The Compact Edition of the Oxford English Dictionary 2633 (1971) (emphasis added). *See Hochfelder*, 425 U.S., at 199 n. 20, 96 S.Ct. at 1384 n. 20 (a dictionary may show ordinary usage). According to its ordinary usage, the language of the waiver of sovereign immunity in section 1323 clearly includes civil penalties.

Congress's 1977 amendment to the Clean Water Act further evidences its intent to waive federal sovereign immunity to civil penalties. Section 1323 was amended in the aftermath of *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976), in which the Court interpreted an earlier version of section 1323 subjected federal agencies to "Federal, State, interstate, and local requirements . . . to the same extent as any person is subject to such requirements." 33 U.S.C. § 1323 (1970). The Court distinguished between substantitve and procedural requirements and held that Congress had not waived sovereign immunity for procedural requirements, including all enforcement mechanisms.[1] The Court held that section

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[1] Although *State Water Resources Control Bd.* and its companion case, *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976), concerned injunctive relief, the Court discussed the issues in terms of enforcement mechanisms. The Court did not distinguish between injunctive relief and civil penaties or damages because it viewed both as procedural requirements, not covered by its interpretation of the pollution acts.

1323 merely subjected federal facilities to the substantive pollution limits in state laws. Following that decision, Congress amended the Clean Water Act, stating that federal facilities were subject to "all" requirements, including "process and sanctions." The amendment clearly subjects federal agencies to civil penalties. The fact that the amendment was provoked by a Supreme Court decision protecting sovereign immunity underscores Congress's determination to waive sovereign immunity for civil penalties.

If Congress's amendment of the Clean Water Act did not waive sovereign immunity for civil penalties, it would be impossible to give meaning to each part of section 1323. The Supreme Court has stated, "It is axiomatic that all parts of an Act 'if at all possible, are to be given effect.'" *F.A.A. Administrator v. Robertson*, 422 U.S. 255, 261, 95 S.Ct. 2140, 2145, 45 L.Ed.2d 164 (1975), *quoting Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633, 93 S.Ct. 2469, 2485, 37 L.Ed.2d 207 (1973) (citations omitted). Section 1323 explicitly limits its waiver of sovereign immunity for civil penalties to those "arising under federal law." This limit would become superfluous if section 1323 were interpreted as not waiving sovereign immunity for civil penalties at all.

In order for the claims brought by the State of Ohio to fall within the waiver of sovereign immunity, those claims must arise under federal law. *See* 33 U.S.C. § 1323. Claims brought under the Clean Water Act itself, such as the claims under 33 U.S.C. § 1365, clearly arise under federal law.

The claims brought under the Ohio water pollution laws also arise under federal law because of the legislative scheme of the Clean Water Act. *See* Ohio Rev.Code § 6111.09. The Clean Water Act mandates that the states may create their own water pollution

laws, which may qualify to *replace* the requirements of the Clean Water Act. 33 U.S.C. § 1342(b). Upon implementing a state permit program "in accordance with" 33 U.S.C. § 1342, the state assumes responsibility for pollution permits on behalf of and instead of the Environmental Protection Agency. 33 U.S.C. § 1342(c). The Environmental Protection Agency is charged with promulgating the standards that state programs must meet to obtain approval. 33 U.S.C. § 1342; *see* 40 C.F.R. § 123 (regulations setting forth the requirements for state programs to be approved). In order to be approved, a state law must provide for civil penalties. 33 U.S.C. § 1342(b)(7); 40 C.F.R. § 123.27(a)(3). Once a state water pollution law is approved, compliance with the state law *is* compliance with the Clean Water Act. 33 U.S.C. § 1342(k). Thus, under the terms of the Clean Water Act, a qualifying state water pollution law, including its civil penalties, arises under federal law.

Other sections of the Clean Water Act emphasize Congress's intent that claims under state pollution laws may arise under federal law. The introductory section of the Clean Water Act states, "It is the policy of Congress that the States . . . implement the policy programs *under* sections 402 and 404 of this Act." 33 U.S.C. § 1251(b) (emphasis added). Congress continually uses language such as "permit issued *under* Section 402 of this Act . . . by a State." 33 U.S.C. § 1319(a) (emphasis added); *see* 33 U.S.C. §§ 1319(c), 1391(d), 1311(i). Further, the Clean Water Act empowers the Environmental Protection Agency to enforce state permits as federal requirements. 33 U.S.C. § 1319(a). Thus, practically speaking, actions under a qualifying state water pollution law arise under federal law.

The Ohio water pollution law, codified at Ohio Rev. Code § 6111, arises under federal law because it is an approved state water pollution law. It is uncontroverted that the Ohio Water Pollution Act meets the requirements of the Clean Water Act. Indeed, as authorized by Congress, the Environmental Protection Agency has suspended its issuance of permits in Ohio in favor of the state's issuance of permits under the Ohio Water Pollution Act pursuant to 33 U.S.C. § 1342(c)(1). The Ohio Act specifically requires the Director of the Ohio Environmental Protection Agency to manage the Ohio pollution permit program in compliance with the Clean Water Act. The Ohio Act also bars the Director from issuing a permit to which the federal Environmental Protection Agency objects. Ohio Rev.Code § 6111.03(J)(3). The limitation of the waiver of sovereign immunity to civil penalties arising under federal law is aimed at state water pollution laws that fail to meet approval under the Clean Water Act; it is not aimed at approved laws such as Ohio Rev.Code § 6111.

Congress clearly has waived sovereign immunity for civil penalties of federal agencies that violate the Clean Water Act and the Ohio Water Pollution Act. Thus, we need not consider the State of Ohio's alternative argument that the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, authorizes civil penalties against federal facilities.

II. *The Resource Conservation and Recovery Act*

The Department of Energy also appeals the district court's determination that the general waiver provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6961, waives sovereign immunity in regard to civil penalties. The State of Ohio responds

that the district court correctly decided this question and, in the alternative, contends that sovereign immunity has been waived under the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972. We hold that Congress did not waive sovereign immunity for civil penalties under the general waiver, but that Congress did waive sovereign immunity for civil penalties under the citizen suit provision.

A. *General Waiver*

Congress has at least waived the immunity of the United States in 42 U.S.C. § 6961, which states:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management or solid waste or hazardous waste *shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief by a court to enforce such relief)*, respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. *Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court, with respect to the enforcement of any such injunctive relief.*

42 U.S.C. § 6961 (emphasis added). This section renders the federal government subject to the "requirements" of federal, state and local laws. The issue is whether "requirements" includes civil penalties in an action brought by a state. Despite indications that Congress intended to waive sovereign immunity for civil penalties here, we find that any such waiver is not stated clearly enough to be recognized. *See Block v. North Dakota*, 461 U.S. 273, 280, 103 S.Ct. 1811, 1816, 75 L.Ed.2d 840 (1983).

An ordinary reading of the phrase, "all . . . requirements," indicates that a civil penalty is a "requirement" because a party violating the statute will be required to pay the penalty. Circumstances surrounding the passage of the Resource Conservation and Recovery Act also support a finding that "requirements" include civil penalties. Congress enacted the Resource Conservation and Recovery Act a few months after the Supreme Court decisions in *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed. 2d 555 (1976), and *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976). These decisions held that Congress did not waive sovereign immunity for procedural requirements, including enforcement mechanisms, in its previously enacted environmental statutes. The Court explicitly based its holding on the fact that the statutory waivers said "requirements" rather than "all requirements." *Hancock*, 426 U.S. at 182, 96 S.Ct. at 2014; *State Water Resources Control Bd.*, 426 U.S. at 214, 96 S.Ct. at 2029 (stating that its reasoning in *Hancock* controls sovereign immunity questions arising under the Clean Water Act as well). In the Resource Conservation and Recovery Act, Congress used the specific language "all requirements," that the Court reasoned to be adequate to

subject the federal government to enforcement mechanisms of state statutes. Thus, Congress *may* have intended to waive sovereign immunity for civil penalties.

Despite these considerations, we decline to find a waiver of immunity for civil penalties under section 6961 because of two complications. The first complication is the difference between the language in section 6961 and the waiver provision in the Clean Water Act provides that federal facilities are subject to both "all requirements" and "sanctions" of federal and state law. 33 U.S.C. § 1321. If "all requirements" includes sanctions, then the discussion of sanctions would be superfluous. In addition, the waiver provision in the Clean Water Act expressly limits the waiver of sovereign immunity to "those civil penalties arising under Federal law." *Id.* As we have already noted, this limit protects the United States from civil penalties under the state water pollution laws that do not have federal approval. Like the Clean Water Act, the Resource Conservation and Recovery Act is an umbrella act for state pollution laws, but, unlike the Clean Water Act, it lacks language to protect the United States from suits under unapproved state laws. Although Congress may have intended to waive sovereign immunity in the Resource Conservation Act, the differences between the Resource Conservation Act and the Clean Water Act make any waiver less than clear.

Second, section 6961 explicitly discusses injunctive relief twice, but never mentions monetary relief or civil penalties. The last statement of section 6961 specifically waives sovereign immunity for injunctive relief and sanctions to enforce injunctive relief. Also, the parenthetical in section 6961, which lists requirements to which the United States may be subjected,

specifically discusses injunctive relief, but it does not mention monetary relief. The list in this parenthetical begins with "including" and we interpret it to be a suggestive rather than exhaustive list. *See P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n. 7, 100 S.Ct. 328, 334 n. 7, 62 L.Ed.2d 225 (1979). Yet the specific mention of injunctive sanctions appears to omit civil penalties too neatly to be an accident. It may be that monetary relief and civil penalties are included in "requirements," as suggested above, but such an interpretation would rest on ambiguous evidence.

In order for us to recognize a Congressional waiver of sovereign immunity, the waiver must be clear-cut. *Block v. North Dakota*, 461 U.S. 273, 280, 103 S.Ct. 1811, 1816, 75 L.Ed.2d 840 (1983); *Hancock v. Train*, 426 U.S. 167, 187, 96 S.Ct. 2006, 2016, 48 L.Ed.2d 555 (1976). We find no such clear waiver here. The Ninth Circuit has found a different plausible reading of section 6961 by distinguishing between requirements and enforcement mechanisms. *People v. Walters*, 751 F.2d 977, 978 (9th Cir.1984) (per curiam) (holding that sovereign immunity was not waived to allow state criminal sanctions because such sanctions are enforcement devices). In *United States v. State of Washington*, 872 F.2d 874 (9th Cir.1989), the Ninth Circuit held that the Resource Conservation and Recovery Act did not waive sovereign immunity for civil penalties because such penalties were enforcement mechanisms. Like the Ninth Circuit, we fail to find a clear waiver of sovereign immunity for civil penalties in section 6961.

B. *Citizen Suit Provision*

Congress clearly waived sovereign immunity for civil penalties in the citizen suit provision of the Re-

source Conservation and Recovery Act, 42 U.S.C. § 6972.[2] Section 6972 states in relevant part:

> (a) Except as provided in subsection (b) or (c) of this section, *any person may commence a civil action on his own behalf*—
>
> (1)(A) *against any person (including (a) the United States, and (b) any other governmental instrumentality or agency*, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
>
> (B) *against any person, including the United States and any other governmental instrumentality or agency*, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

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[2] The Ninth Circuit did not address this issue in either *Walters*, 751 F.2d 977, or *Washington*, 872 F.2d 874.

> . . . *The district court shall have jurisdiction*, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(a), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(b), to order such person to take such action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and *to apply any appropriate civil penalties under section 6928(a) and (g) of this title.*

Id. (emphasis added). The State of Ohio may bring its action under the citizen's suit provision because the definition of "person" includes states under the Resource Conservation and Recovery Act. 42 U.S.C. § 6903(15). The citizen's suit provision explicitly allows the action to be brought against the United States or a federal instrumentality, agency, or administrator. In bringing the action, the State of Ohio may seek civil penalties under 42 U.S.C. §§ 6928(a), 6928(g).

The Department of Energy argues that the United States is not included in the scope of the civil penalties allowed under the citizen's suit provision. Civil penalties are included in section 6972 by reference to another section of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928, but the United States is included in the definition of a "person" *only* under section 6972. *Compare* 42 U.S.C. § 6972(a)(1) (specifically including the United States as a "person")

with 42 U.S.C. § 6903(15) (United States not included in general definition of "person"). In order to find that Congress clearly waived sovereign immunity for civil penalties, we must find that Congress clearly intended that its specific inclusion of the United States for citizen suits would extend to the application of civil penalties.

The fairest reading of section 6972 includes the United States in the application of civil penalties. Section 6972 incorporates the civil penalty sections, not vice versa. Thus, the definition of "person" within section 6972 applies, not the general definition in 42 U.S.C. § 6903(15). This definition of "person" within section 6972 includes the United States. In addition, the legislative history demonstrates that Congress intended to subject the United States to civil penalties in citizen suits. The Senate Committee stated:

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States. . . ."

S.Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). Although this discussion concerns the requirements for federal facilities to submit an inventory of hazardous waste sites to the Environmental Protection Agency, this statement shows the Senate's intent that civil penalties would be available in a citizen's suit against the United States.

Congress's waiver of sovereign immunity for civil penalties accords with the underlying congressional

policy of the Resource Conservation and Recovery Act to eliminate the unsafe disposal of hazardous wastes. H.R.Rep. No. 1491, 94th Cing., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin.News 6238, 6241; *see Franchise Tax Bd. of Cal. v. U.S. Postal Service*, 467 U.S. 512, 521, 104 S.Ct. 2549, 1554, 81 L.Ed.2d 446 (1984). Congress expressed great concern for hazardous waste disposal at federal facilities because the federal government owned over 20,000 such facilities. H.R.Rep. No. 1491 at 46, *reprinted in* 1976 U.S.Code Cong. & Admin.News at 6284. Far from protecting federal facilities from failure to comply with hazardous waste pollution laws, Congress demanded that federal facilities "provide national leadership in dealing with solid waste and hazardous waste disposal systems." S.Rep. No. 988, 94th Cong., 2d Sess., 24 (1976). In light of these broad goals, the clear interpretation of Congress's later addition of civil penalties is that Congress intended to apply those penalties to federal facilities as well as private entities, consistent with the other aspects of the citizen suit provision.

We find that Congress has waived sovereign immunity for civil penalties under both the Clean Water Act and the Resource Conservation and Recovery Act. Therefore, the judgment of the district court is affirmed.

GUY, Circuit Judge, dissenting.

The majority's opinion in this case establishes that the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1323(a), and the citizen suit provision of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972, evince congressional intent to waive sovereign immunity as to

civil penalties assessed against the United States Department of Energy (DOE). Because I find the waiver in each statute too narrow to support the imposition of civil sanctions in this case, I respectfully dissent from the majority's rulings regarding both the Clean Water Act and the citizen suit provision of the RCRA.[1]

I.

The principle of sovereign immunity is deeply rooted in American jurisprudence. The Supreme Court has consistently emphasized that "[a]s sovereign, the United States, in the absence of its consent, is immune from suit." *Library of Congress v. Shaw*, 478 U.S. 310, 315, 106 S.Ct. 2957, 2962, 92 L.Ed.2d 250 (1986). Therefore, "[t]he States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States" absent an "express waiver of this immunity by Congress." *Block v. North Dakota*, 461 U.S. 273, 280, 103 S.Ct. 1811, 1816, 75 L.Ed.2d 840 (1983). In discerning whether a statute contains such a waiver, courts must not adopt a "crabbed construction" of statutory language or demand that Congress utilize a "ritualistic formula" to relinquish sovereign immunity. *Franchise Tax Board v. United States Postal Serv.*, 467 U.S. 512, 521, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984). Nevertheless, it is undisputed that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' "

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[1] I agree with the majority's conclusion that the general waiver of sovereign immunity contained in the RCRA, 42 U.S.C. § 6961, does not permit recovery of civil penalties. *See also United States v. State of Washington*, 872 F.2d 874, 880 (9th Cir.1989). To that extent, therefore, I join section II(A) of the majority opinion.

Selden Apartments v. United States Dep't of Hous. and Urban Dev., 785 F.2d 152, 156 (6th Cir. 1986) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503, 23 L.Ed.2d 52 (1969)). Accordingly, it is our responsibility to select "[t]he most natural reading" of the statutory terminology in ascertaining whether the United States has waived sovereign immunity. *See Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57, 108 S.Ct. 376, 381, 98 L.Ed.2d 306 (1987).

II.

The Clean Water Act's provision governing federal agencies' obligations, *see* 33 U.S.C. § 1323(a), which became law in its present form in 1977,[2] *see* Pub.L. No. 95-217, § 61(a), 91 Stat. 1598 (1977), contains language differing from the RCRA analogue that the majority properly treats as insufficiently broad to encompass civil penalties. *Compare* 33 U.S.C. § 1323 (a) *with* 42 U.S.C. § 6961. Consequently, the majority's conclusion that the general waiver provision in the RCRA "does not permit civil penalties should not automatically be applied to the [Clean Water Act]." *Metropolitan Sanitary Dist. of Greater Chicago v. United States Dep't of the Navy*, 722 F.Supp. 1565, 1570 n. 3 (N.D.Ill.1989). However, I disagree with

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[2] The statutory language was altered to counter-act the Supreme Court's 1976 decisions in *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976), and *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976), which restricted the sovereign immunity waiver prescribed by the former Clean Water Act and Clean Air Act provisions to substantive standards. *See e.g.*, S.REP. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S.CODE CONG. & ADMIN.NEWS 4326, 4392.

the majority's interpretation of the general waiver provision contained in the Clean Water Act as broad enough to support imposition of civil penalties against the DOE.

A.

Compared to the RCRA's general waiver provision, *see* 42 U.S.C. § 6961, the pertinent portions of 33 U.S.C. § 1323(a) provide a lucid description of the extent to which sovereign immunity has been waived under the Clean Water Act. Specifically, section 1323(a) states:

> *Each department, agency,* or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . *shall be subject to,* and comply with, *all* Federal, State, interstate, and local *requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution* in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. *This subsection shall apply notwithstanding any immunity of such agencies,* officers, agents, or employeees *under any law or rule of law. . . . [T]he United States shall be liable only for those civil penalties arising under Federal law* or imposed by a State

> or local court to enforce an order or the process of such court. (Emphasis added).

The Clean Water Act thus extends the obligation of federal departments and agencies to all "sanctions respecting the control and abatement of water pollution[.]" *See* 33 U.S.C. § 1323(a). Moreover, congressional delineation of federal agencies' responsibilities under the Clean Water Act speaks of "any process and sanction" in addition to "any requirement whether substantive or procedural[.]" *Compare id.* § 1323(a)(2)(A) *with id.* § 1323(a)(2)(C). I agree with the majority that this language undoubtedly encompasses civil penalties. However, Congress inserted language in section 1323(a) that limits federal liability to "those civil penalties arising under Federal law[,]" thereby acknowledging the previously expressed waiver of sovereign immunity while circumscribing its scope. *See, e.g., Metropolitan Sanitary Dist.*, 722 F.Supp. at 1571-72. Analysis of section 1323(a) therefore leads to the inescapable conclusion that Congress has waived sovereign immunity in the Clean Water Act for all civil penalties arising under federal, but not state, law.[3]

B.

The dispositive question in this case, as the majority observes and the district court aptly noted, is whether the civil penalties at issue arise under fed-

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[3] The district court in *McClellan Ecological Seepage Situation v. Weinberger*, 655 F.Supp. 501 (E.D.Cal.1986), similarly interpreted 33 U.S.C. § 1323(a), but rejected such a construction as an inadequate "vehicle to end the pollution which this country is facing[.]" *Id.* at 604. Courts need not debate Congress's sagacity, however, when its intent is so apparent from the face of the statute.

eral law. *See State of Ohio v. United States Dep't of Energy*, 689 F.Supp. 760, 767 (S.D.Ohio 1988). The State of Ohio contends that its permit system, which is federally approved and monitored, authorizes civil penalties against the DOE for pollution discharge violations. The DOE characterizes Ohio's permit system as purely a state law scheme, and adamantly contests Ohio's assertion that sanctions for violations of its pollution discharge permit arise under federal law. Resolution of this issue, therefore, depends upon the origin and nature of Ohio's permit system.

Although the Clean Water Act prohibits the discharge of any pollutant into navigable waters[,]" *Gwaltney*, 484 U.S. at 52, 108 S.Ct. at 379 (citing 33 U.S.C. § 1311(a)), an exception to this general rule empowers the Environmental Protection Agency (EPA) to issue permits allowing pollution discharge "in accordance with specified conditions." *See id.* (citing 33 U.S.C. § 1342(a)). Issuance of a permit "serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger[.]" *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, 96 S.Ct. 2022, 2025, 48 L.Ed.2d 578 (1976). This permit concept, known as the National Pollutant Discharge Elimination System (NPDES), is operated and policed exclusively by the EPA absent state participation. *See* 33 U.S.C. § 1342(a); *see also American Paper Inst., Inc. v. EPA*, 890 F.2d 869, 871 (7th Cir.1989). The congressionally designed permit scheme, however, leaves substantial leeway for state participation. *See American Paper*, 890 F.2d at 873

("[T]he Clean Water Act evince[s] a strong congressional intent to make the states, where possible, the primary regulators of the NPDES system.").

As we have explained, 33 U.S.C. § 1342(b) allows a state "to administer its own permit program for discharges into navigable waters within its jurisdiction upon approval of the program by [the] EPA." *United States ex rel. Tennessee Valley Auth. v. Tennessee Water Quality Control Bd.*, 717 F.2d 992, 998 (6th Cir.1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1909, 80 L.Ed.2d 458 (1984). "Once the [EPA]'s approval is given, the State may issue NPDES permits as long as the permits meet the requirements of the [Clean Water Act]." *Ford Motor Co. v. EPA*, 567 F.2d 661, 664 (6th Cir.1977). When a state assumes responsibility for the NPDES permit program, the Clean Water Act "calls for the [EPA] Administrator to suspend the issuance of federal permits as to waters subject to [the] approved state program." *Gwaltney*, 484 U.S. at 52, 108 S.Ct. at 379 (citing 33 U.S.C. § 1342(c)(1)). Nevertheless, the EPA does retain the power to "review operation of a State's permit program[,]" *EPA v. California*, 426 U.S. at 208, 96 S.Ct. at 2026, "veto . . . a State's issuance of an individual permit[,]" *Ford*, 567 F.2d at 664, and "withdraw approval of a state permit program which is not being administered in compliance with" 33 U.S.C. § 1342. *EPA v. California*, 426 U.S. at 208, 96 S.Ct. at 2026. Thus, an approved state permit program is largely autonomous, but still subject to general federal oversight.

C.

The State of Ohio formulated a water pollution control scheme including a NPDES permit program

for federal facilities, *see* Ohio Rev. Code Ann. §§ 6111.01 *et seq.* (Anderson 1977 & Supp.1989), which gained EPA approval in 1983. *See* 48 Fed. Reg. 5,918 (1983). Consistent with the Clean Water Act's statutory directive, *see* 33 U.S.C. § 1342(b)(7), the State of Ohio incorporated a civil penalty provision into its permit program. *See* Ohio Rev.Code Ann. § 6111.09. When the State of Ohio assumed administrative and enforcement responsibilities for its NPDES program concerning federal sites in 1983, the state inherited the task of monitoring the DOE's compliance with the permit at issue in this case. The state subsequently became dissatisfied with the DOE's performance at the Fernald facility and filed this suit requesting that the district court impose civil penalties pursuant to the Ohio penalty provision.

Contrary to the majority's conclusion, the civil sanctions prescribed by Ohio's statutory scheme, in my view, do not "aris[e] under Federal law." *See* 33 U.S.C. § 1323(a). Congress therefore has not waived sovereign immunity as to such penalties. Although the Clean Water Act encourages inclusion of "civil and criminal penalties" in state permit programs, *see* 33 U.S.C. § 1342(b)(7), and the EPA retains limited authority to oversee approved state NPDES schemes, the Clean Water Act unequivocally indicates that state permit programs are "establish[ed] and administer[ed] under *State* law." *See* 33 U.S.C. § 1342(b) (emphasis added). Moreover, the Clean Water Act's legislative history emphasizes that "state permit programs are 'not a delegation of Federal authority,' but instead are state programs which 'function[] in lieu of the Federal program.'" *State of California v. United States Dep't of the Navy*, 845 F.2d 222, 225 (9th Cir.1988) (quoting H.R.REP. No.

830, 95th Cong., 1st Sess. 104, *reprinted in* 1977 U.S.Code Cong. & Admin. News 4327, 4479). While "[t]he right of the State [of Ohio] to require discharge permits is derived solely from [33 U.S.C. § 1342]," *Tennessee Water Bd.*, 717 F.2d at 999, the penalty provisions adopted by the State of Ohio in furtherance of its permit program are not grounded in federal law. *See, e.g., U.S. Dep't of the Navy*, 845 F.2d at 225-226. Consequently, sovereign immunity precludes the State of Ohio from pressing its claims for state civil penalties against the DOE under the Clean Water Act. *See id.* I dissent from the majority's contrary conclusion.

III.

The RCRA's citizen suit provision expressly indicates that "any person may commence a civil action on his own behalf" against "any person, including the United States and any other governmental instrumentality or agency" to redress violations of the RCRA. *See* 42 U.S.C. §§ 6972(a)(1)(A) & (B). Because the RCRA's definition of a "person" includes states, *see* 42 U.S.C. § 6903(15), the majority is correct in finding that the RCRA's citizen suit provision authorizes the State of Ohio to bring a citizen suit against the DOE. However, I believe that the majority errs in defining the scope of the DOE's exposure under the RCRA citizen suit provision to include civil penalties.

According to the RCRA citizen suit provision, "[t]he district court shall have jurisdiction" only to enforce permits and standards, to restrain mishandling of solid or hazardous waste, to order the Administrator to perform specified acts and duties, and "to apply any appropriate civil penalties under section

6928(a) and (g) of this title." 42 U.S.C. § 6972(a); *cf. also Walls v. Waste Resource Corp.*, 761 F.2d 311, 315 (6th Cir.1985) (the "liberal grant of standing to sue" in the RCRA citizen suit provision "is limited by subsequent provisions which restrict the type of relief available to injunctive and other equitable remedies"). Consequently, judicial authority to impose civil penalties in response to RCRA citizen suits is limited to sanctions permitted under 42 U.S.C. §§ 6928(a) and (g). Sections 6928(a) and (g), in turn, permit the imposition of civil penalties against "any person" responsible for violating the RCRA. Whether such penalties may be assessed against the DOE, therefore, depends upon whether the DOE (or the United States in general) can be characterized as a "person" under the RCRA. On this pivotal issue, I disagree with the majority's determination that the federal government constitutes a "person" for purposes of the RCRA.

Congress chose to define the term "person" for purposes of the RCRA to include "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." *See* 42 U.S.C. § 6903(15). In a RCRA citizen suit, each of these "persons" is potentially subject to civil penalties as allowed by 42 U.S.C. §§ 6928(a) and (g). Conspicuous by its absence from the statutory list of "persons," however, is the United States. *See McClellan Ecological Seepage Situation v. Weinberger*, 655 F. Supp. 601, 603 (E.D.Cal.1986) ("[T]he general definition of 'person' in RCRA § 1004(15), 42 U.S.C. § 6903(15), . . . seems to name everyone under the sun save for the United States of America."). The

only reasonable inference that can be drawn from this noticeable omission is "that indeed Congress did not intend, nor did it legislate specifically, a waiver of sovereign immunity for civil penalties under the [RCRA] citizen suit provision." *Id.* at 603-04.

The majority reads the langauge from the citizen suit provision authorizing the commencement of an action against "any person, including the United States and any other governmental instrumentality" as incorporating the United States within the definition of a "person" susceptible to civil penalties under 42 U.S.C. §§ 6928(a) and (g). In my view, this language militates *against* the majority's conclusion that the United States is a "person" subject to civil penalties in a RCRA citizen suit. If Congress intended the United States to be a "person" subject to civil penalties, the reference to "any person, including the United States" should have appeared in sections 6928(a) and (g) just as it appears in the citizen suit provision. *See id.* at 604. Contrary to the majority's conclusion, the fairest reading of section 6972 in conjunction with sections 6928(a) and (g) and section 6903(15) is that the United States—including the DOE—is subject to citizen suits brought by states seeking declaratory enforcement orders and injunctive relief, but civil penalties cannot be imposed in such actions against the United States or the DOE.[4]

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[4] The exclusion of the United States from the list of "persons" subject to civil penalties seems entirely logical because such penalties assessed under the RCRA are payable "to the United States." *See* 42 U.S.C. § 6928(g); *cf. also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 n. 25, 101 S.Ct. 2615, 2623 n. 25, 69 L.Ed.2d 435 (1981) (civil penalties assessed in Clean Water Act citizen suits are payable to the federal government). Thus, the civil

Because the majority opinion misreads the RCRA to broaden the scope of the DOE's potential exposure, I dissent from the majority's RCRA analysis insofar as the citizen suit provision is concerned.

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penalties authorized by the majority, if imposed by the district court, simply will be paid by the DOE to the federal treasury.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. OHIO, W.D.

No. C-1-86-0217

STATE OF OHIO, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF ENERGY,
ET AL., DEFENDANTS

March 18, 1988

ORDER DENYING MOTION TO DISMISS

SPIEGEL, District Judge.

This matter is before the Court for consideration of defendant's motion to dismiss and motion to stay (doc. 20). Plaintiff has responded in opposition to the motions (doc. 32).

On March 11, 1986, plaintiff State of Ohio filed this action for injunctive relief, damages, civil penalties and declaratory relief against the United States Department of Energy, the Secretary of Energy and their contractors at the Feed Materials Production Center (FMPC), NLO, Inc. (NLO), and NL Industries, Inc. (NL Industries). Plaintiff alleges that defendants have improperly disposed of hazardous wastes, have released radioactive mate-

rials into the air, water and soil, and have polluted surface water and ground water with chemical and radioactive contaminants. The State substantially bases its claims on the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §§ 9601 *et seq.*, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. §§ 1251 *et seq.*, the Ohio Solid & Hazardous Waste Control Act, Ohio Rev. Code Ann. ch. 3734 (Baldwin 1982) and the Ohio Water Pollution Control Act, Ohio Rev. Code Ann. ch. 6111 (Baldwin 1982).

The DOE filed its motion to dismiss and motion to stay on November 7, 1986, seeking (1) to dismiss Count I of the Complaint (for the recovery of response costs under CERCLA); (2) a stay of Count II (for natural resources damages under CERCLA); (3) to dismiss Counts III through XVI (for injunctive relief and civil penalties under RCRA and the Ohio Solid & Hazardous Waste Control Act); and (4) to dismiss Counts XVII through XXVI (for injunctive relief an civil penalties under CWA and the Ohio Water Pollution Control Act). This motion came on for hearing on January 28, 1988. At that time, the parties informed the Court that Count I has been withdrawn and that they agree to stay Count II pending completion of a Remedial Investigation/Feasibility Study (RI/FS). Counts III-XVI and XVII-XXVI have been withdrawn to the extent they seek injunctive relief under the aforementioned Acts. Thus, only the claims for civil penalties are before the Court. The DOE moves to dismiss those claims pursuant to Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P., on grounds that the claims are barred

by the doctrine of sovereign immunity. Plaintiff argues that the government has waived its sovereign immunity with respect to these claims.

The issues to be determined are whether this Court has the authority to impose civil penalties on the Department of Energy and whether the State could recover such penalties.

I.

The United States may not be sued absent its consent. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941). Waivers of immunity are strictly construed and are not "enlarged . . . beyond what the language [of the pertinent statutes] requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86, 103 S.Ct. 3274, 3277-78, 77 L.Ed.2d 938 (1983) (quoting *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 291, 71 L.Ed. 472 (1927)).

II.

Section 6001 of the RCRA provides in part that:

> [e]ach department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local *requirements*, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to

> enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

42 U.S.C. § 6961 (emphasis added).

Section 6001 was enacted in its present form in response to the Supreme Court's decisions in *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed. 2d 555 (1976) and *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976). These cases held that the Clean Air Act and the Federal Water Pollution Control Act did not clearly and unambiguously demonstrate Congressional intent to subject federal facilities to state permit requirements. In refusing to expose federal installations to state control, the Court specifically distinguished substantive requirements respecting control and abatement of pollution from procedural (administrative and enforcement) requirements. *Hancock*, 426 U.S. at 183, 185, 96 S.Ct. at 2014, 2015; *State Water Resources Control Board*, 426 U.S. at 215, 96 S.Ct. at 2029.

Congress enacted the new RCRA three months after the Supreme Court announced *Hancock* and *State Water Resources Control Board*, and amended the Clean Air Act, the Clean Water Act and the Safe Drinking Water Act during the following year.[1]

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[1] The CAA and the SDWA amendments, enacted after the RCRA and before the CWA, have been held to contain ex-

In each environmental statute, Congress used language referring to "all" state requirements, both substantive and procedural.

III.

Although there is no reference to civil penalties in section 6001, plaintiff argues that the language subjecting each department to all federal and state "requirements" is sufficient to encompass civil penalties. Plaintiff submits that the parenthetical list following this language is not inclusive, but illustrative. Plaintiff also argues that "sanctions" includes civil penalties. In addition, the State asserts that RCRA § 7002 authorizes the assessment of civil penalties against federal facilities in the context of citizen suits. Section 7002(a) provides in pertinent part that:

> [e]xcept as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
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> (1)(A) *against any person* (*including* (*a*) *the United States*, and (b) any other governmental instrumentality or agency . . .) who is alleged to be in violation of any permit, standard, regulation, condition, re-

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press waivers of sovereign immunity as to civil penalties. 42 U.S.C. § 7418(a); 42 U.S.C. § 300j-6(a); *State of Alabama ex rel. Graddick v. Veterans Administration*, 648 F.Supp. 1208 (M.D.Ala.1986); *State of Ohio ex rel. Celebrezze v. United States Dep't of the Air Force*, —— F.Supp. ——, No. C-2-86-0175 (S.D.Ohio Mar. 9, 1987) (unpublished). The CWA waives immunity to civil penalties only to the extent that they arise under Federal law or are imposed by a State or local court to enforce an order or the process of such court. 33 U.S.C. § 1323(a). The RCRA does not contain direct language reflecting either approach.

> quirement, prohibition, or order which has become effective pursuant to this chapter; or
>
> (B) *against any person, including the United States* and any other governmental instrumentality or agency . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . .
>
> * * * * *
>
> The district court shall have jurisdiction . . . to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both . . . as the case may be, and *to apply any appropriate civil penalties under section 6928(a) and (g) of this title.*

42 U.S.C. § 6972(a) (emphasis added).

Plaintiff also refers to the legislative history of the 1984 RCRA Amendments to support its contention that section 7002 renders the government liable for civil penalties. Senate Report No. 284, 98th Cong., 1st Sess. 44 (1983) states in part that:

> [t]he duty to compile and submit the inventory to the Administrator is a mandatory, nondiscretionary duty. Should an agency fail to carry out

> the inventory requirements, section 3015 requires the Administrator to compile the inventory. The Administrator's duty is also nondiscretionary. Either a noncomplying agency of [sic] the Administrator, if he fails to act, are [sic] subject to the citizen suit and penalty provisions of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against 'any person, including the United States . . .'.

Plaintiff asserts that, although this report refers to an unrelated section of the RCRA, it reflects Congress' intent to authorize civil penalties under section 7002.

Defendant argues that because waivers of sovereign immunity must be strictly construed, courts may not imply such waivers from the plain language of section 6001. It asserts that the term "requirement" does not normally include penalties or injunctions, and that the specific inclusion of injunctions in section 6001 only makes the absence of civil penalties more significant. Defendant also states that post-hoc legislative history cannot describe the views of a previous Congress with any accuracy. Finally, defendant argues that even if "sanctions" may be interpreted to include civil penalties, under the plain language of section 6001 they may be imposed only to enforce an injunction.

With regard to section 7002, defendant states that it provides authority for imposition of any appropriate civil penalty against "any person" under RCRA §§ 3008(a) and (g). Defendant asserts that the definition of "person" in the RCRA does not include the United States. RCRA § 1004(15), 42 U.S.C. § 6903(15).

IV.

Few Courts have considered the issue of sovereign immunity from civil penalties in the context of the RCRA. In *Meyer v. United States Coast Guard*, 644 F.Supp. 221 (E.D.N.C. 1986), the language and legislative history of RCRA § 6001 were found inadequate to waive sovereign immunity for civil penalties. The *Meyer* court specifically relied on two cases which did not involve government immunity from civil penalties, *People of the State of Cal. v. Walters*, 751 F.2d 977 (9th Cir. 1984) (per curiam) and *State of Fla. Dep't of Envtl. Regulation v. Silvex Corp.*, 606 F. Supp. 159 (M.D.Fla. 1985). *Walters* has been cited as the leading case on waiver under section 6001. It specifically held that criminal sanctions are not a "requirement" within the meaning of section 6001, but are the means by which requirements are enforced. *Walters*, 751 F.2d at 978. These cases were cited in *Meyer* as support for a "restrictive" interpretation of the waiver of sovereign immunity in section 6001.

The court in *McClellan Ecological Seepage Situation v. Weinberger*, 655 F.Supp. 601 (E.D.Cal. 1986) (hereinafter *MESS*) found *Meyer* instructive, and likewise determined that section 6001 does not effectuate a waiver of immunity. The court stated that "RCRA § 6001 on its face does not provide clearly and succinctly for a waiver of sovereign immunity for civil penalties, and none will be implied." *MESS*, 655 F.Supp. at 603.

In *United States of America v. State of Washington*, C-87-291-AAM (E.D.Wash. Jan. 22, 1988), the court relied on *Walters*, *Meyer*, and *MESS* in concluding that RCRA § 6001 does not waive the government's immunity from state civil penalties. The

Washington court explicitly accepted the *Walters* distinction between "requirements" and the means by which requirements are enforced. *Washington*, slip op. at 4. The court further found that no waiver was evident on the face of the statute, and that none could be implied from its ambiguous legislative history. Accordingly, the court granted the government's motion for summary judgment.

Conversely, United States Magistrate Hornby has issued a "Recommended Decision on Defendant's Motion for Partial Summary Judgment," concluding that section 6001 permits the recovery of civil penalties by a state administrative agency against the federal government. *State of Maine v. Department of the Navy*, 86-211 P, (D.Me. Nov. 16, 1987) (unpublished). The district court has not yet ruled on the issue. The Magistrate found that "the plain language of the statute with the ordinary implications a reader would draw meets the Supreme Court's requirement that Congress plainly manifest its intent to waive sovereign immunity." *Maine*, slip op. at 11. Magistrate Hornby specifically noted that the parenthetical language in section 6001, beginning with "including," clearly does not constitute a complete list of waivers. *Id.* at 12. He also disagreed with the Ninth Circuit's distinction between requirements and enforcement devices, claiming that the creation of a sovereign immunity category of enforcement devices contradicts the Supreme Court's analysis in *Hancock v. Train*. Id. at 7 n. 5.

We conclude that the Magistrate's analysis of *Walters* and *Hancock* is correct. The *Hancock* court considered the permit requirement an enforcement device, characterizing it as procedural in nature. *Hancock*, 426 U.S. at 183, 96 S.Ct. at 2014. The court went on to distinguish between procedural and

substantive requirements, holding that Congress intended to subject federal facilities only to substantive state standards. In response to this determination, Congress amended the RCRA to include "all Federal, State, interstate, and local requirements, both substantive and procedural. . . ." RCRA § 6001, 42 U.S.C. § 6961. Despite this Congressional mandate, the Ninth Circuit Court of Appeals in *Walters* held that section 6001 does not waive sovereign immunity to state imposition of criminal sanctions because such sanctions are enforcement devices rather than a "substantive or procedural requirement." *Walters*, 751 F.2d at 978. We decline to follow the reasoning of *Walters* and its progeny.

The relevant language of section 6001 provides that each "agency . . . having jurisdiction over any solid waste management facility . . . shall be subject to, and comply with, all . . . state requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief). . . ." Other courts have concluded from the face of this legislation that it was not intended to waive sovereign immunity to civil penalties. *MESS*, 655 F.Supp. at 604; *Meyer*, 644 F.Supp. at 222-23. We cannot agree, particularly given the context of this section's amendment. Section 6001 was altered in response to the *Hancock* and *State Water Resources Control Board* decisions, which held that Congress did not waive immunity as to procedural (including enforcement) requirements. Congress could compel a different result only by expressly including state procedural requirements (and thereby enforcement devices) in the waiver provisions of the RCRA. The legislature elected to do so, making federal agencies subject to all

state requirements, both substantive and procedural. RCRA § 6001, 42 U.S.C. § 6961.

Had Congress intended only to reverse the results of *Hancock* and *State Water Resources Control Board*, it could have added parenthetical language waiving sovereign immunity as to state requirements for permits but leaving section 6001 intact in all other respects. Because it instead subjected federal agencies to *all* state requirements, the parenthetical language in the current version of section 6001 cannot constitute a complete list of waivers.[2] This conclusion is reinforced by the structure of the parenthetical list; it begins with the word "including" rather than with a word of limitation. Thus, Congress' failure to list civil penalties in the parenthetical cannot support the negative inference that it did not intend to waive the government's immunity to such penalties.[3]

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[2] Plaintiff cites the following examples of essential procedural requirements not contained in the parenthetical list: completion of manifests to identify hazardous waste being transported by truck (40 CFR 262.33, O.A.C. 3745-52-23), writing contingency plans to prepare hazardous waste facilities for fires, explosions, and other hazardous waste emergencies (40 C.F.R. 264.51, O.A.C. 3745-54-51), planning for safe closure of hazardous waste after use (40 CFR 264.112, O.A.C. 3745-55-12), and keeping an operating log to record locations of hazardous waste (40 CFR 264.73, O.A.C. 3745-54-73).

[3] Nor can the subsequent statement—"[n]either the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief"—support an inference that exemption exists as to everything else. *See Maine*, slip op. at 12 n. 7. Although we admit our analysis of the preceding language, such repetition does not mandate a different conclusion. The opposite

Based on the context in which section 6001 was amended by Congress, and the language of that amendment, the Court concludes that Congress intended to waive sovereign immunity to civil penalties under the RCRA.

V.

Plaintiff has pleaded federal violation of the Ohio Solid Waste Disposal Act, Ohio Rev.Code Ann. §§3734.01 *et seq.*, with particularity. If it can prove facts supporting these claims, it may recover. Accordingly, defendant's motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., must be denied. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976).

VI.

Section 313 of the Clean Water Act provides in pertinent part that:

> [e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution

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result is illogical rather than simply repetitive. It requires that we do not assign to the words "all" and "including" their recognized meanings.

> in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever) (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. . . . No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and *the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.*

33 U.S.C. § 1323(a) (emphasis added).

Congress enacted the CWA in this form one year after the Supreme Court issued *Hancock* and *State Water Resources Control Board*. It was the last environmental statute to be amended in response to these decisions, and is the only act of the four to refer specifically to the United States' liability for civil penalties.

VII.

Plaintiff argues that federal agencies and officers are subject to state civil penalties because such penalties are "sanctions" within the meaning of the Act.

According to plaintiff, the section then modifies this broad waiver by limiting the United States' liability for civil penalties to those arising under Federal law or those imposed by a State or local court to enforce an order or the process of such court. CWA § 313, 33 U.S.C. § 1323. Ohio contends that the civil penalties imposed under the state-administered National Pollutant Discharge Elimination System (NPDES) arise under federal law because they were imposed for violations of a permit issued by the United States Environmental Protection Agency (EPA) pursuant to 33 U.S.C. § 1342 and transferred to Ohio Environmental Protection Agency administration. Finally, plaintiff argues that the citizen suit provision of the CWA authorizes civil penalties for violations of the Act.[4]

Defendant argues that civil penalties are not expressly included in the term "sanction," and that no such interpretation may be implied. The DOE further states that even if civil penalties are available

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[4] CWA § 505(a) provides in part that:

> [e]xcept as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against *any person (including (i) the United States . . .)* who is alleged to be in violation of (A) an effluents standard or limitation under this Act . . .
>
> The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation . . . and *to apply any appropriate civil penalties under section 309(d) of this Act.* [33 U.S.C. 1319].

33 U.S.C. § 1365 (emphasis added).

Section 309(d) provides that any "person" to violates certain requirements of the CWA is subject to civil penalties. Defendant states that the defintion of "person" in the CWA does not include the United States. *See* CWA § 502(5), 33 U.S.C. § 1362(5).

for violation of federal law, the EPA's approval of a state program does not convert the penalty provisions of state law into federal law. In addition, defendant asserts that the citizen suit provision of the CWA does not authorize the assessment of civil penalties against the United States.

VIII.

The only case directly examining CWA § 313(a) for waiver of sovereign immunity is *MESS*, 655 F. Supp. 601 (E.D.Cal. 1986). The *MESS* court labeled CWA § 313(a) a "compilation of ambiguity," noting that the language of the Act seems to prohibit application of civil penalties under state or local laws that are exact duplicates of enforceable CWA penalty provisions. *MESS*, 655 F.Supp. at 604. The court called such a result an "absurdity," but nonetheless found that the plaintiff had not demonstrated waiver of sovereign immunity. *Id.* at 605. It is not clear from the *MESS* opinion whether the Court considered an argument that civil penalties imposed under the state-administered NPDES arise under federal law. We believe that this is the primary issue confronting this Court in terms of waiver of immunity under the CWA.

The National Pollutant Discharge Elimination System (NPDES) authorizes the Administrator of the EPA to issue a permit for the discharge of pollutants into navigable waters. 33 U.S.C. § 1342(a)(1). The Administrator's permit program is subject to the same terms, conditions and requirements as apply to a State permit program under this section. 33 U.S.C. § 1342(a)(3). A State may submit a proposed permit program to the Administrator, who will approve the program unless he or she determines that the

State lacks authority to administer it. 33 U.S.C. § 1342(b). Among other things, the State must have authority to abate violations of the permit or the permit program through imposition of civil and criminal penalties and other ways and means of enforcement. 33 U.S.C. § 1342(b)(1). If the State program is approved, the Federal permit program must be withdrawn. 33 U.S.C. § 1342(c)(1). The State program must then be administered in accordance with Federal guidelines. 33 U.S.C. § 1342(c)(2).

Defendant argues that once a state is authorized to administer its own NPDES permit program, the program is operated by the state under state, not federal, law. It asserts that the Administrator's approval of a state program does not convert the penalty provisions of state law into federal law. However, section 313(a) does not require such a conversion. Rather, it imposes liability on the United States for civil penalties "arising under" Federal law. The state program insures compliance with the pollution prevention standards defined by the Act. Compliance with a state permit is deemed compliance with the CWA. 33 U.S.C. § 1342(k). Under these circumstances, we find that civil penalties imposed under the state program "arise under Federal law." Accordingly, the Court concludes that Congress intended to waive sovereign immunity to civil penalties under the CWA.

IX.

Plaintiff has pleaded federal violation of the Ohio Water Pollution Control Act, Ohio Rev.Code Ann. ch. 6111, with particularity. If it can prove facts supporting these claims, it may recover. Accordingly, defendant's motion to dismiss the CWA claims under Rule 12(b)(6), Fed.R.Civ.P., must also be denied.

See Conley, 355 U.S. at 45-46, 78 S.Ct. at 101-102; *Westlake*, 537 F.2d at 858.

X.

The Court concludes that Congress intended to waive sovereign immunity to civil claims under both the RCRA and the CWA. The plaintiff has pleaded its state claims with sufficient particularity. Therefore, we find that this Court has the authority to impose civil penalties on the Department of Energy, and that, if violations are proven, the State may recover such penalties. Accordingly, it is Ordered that defendant's motion to dismiss is denied.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-3329

STATE OF OHIO; ANTHONY J. CELEBREZZE, JR., ATTORNEY GENERAL, PLAINTIFFS-APPELLEES

v.

U.S. DEPARTMENT OF ENERGY, DEFENDANT-APPELLANT

JOHN S. HERRINGTON, SECRETARY OF ENERGY; NLO, INC., NL INDUSTRIES, INC., DEFENDANTS

ORDER

[Filed Oct. 10, 1990]

Before: MARTIN, JONES and GUY, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-3329

STATE OF OHIO and ANTHONY J. CELEBREZZE, JR., Attorney General, PLAINTIFFS-APPELLEES

v.

U.S. DEPARTMENT OF ENERGY, DEFENDANT-APPELLANT

JOHN S. HERRINGTON, ET AL., DEFENDANTS

On Appeal from the United States District Court for the Southern District of Ohio

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Before: MARTIN, JONES and GUY, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the

judgment of the said district court in this case be and the same is hereby affirmed.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN, Clerk

/s/ Leonard Green
Clerk

Issued as Mandate: October 18, 1990

A True Copy.

Attest:

/s/ Valarie Fields
Deputy Clerk

APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. Sections 313(a) and 505(a) of the Clean Water Act, 33 U.S.C. 1323(a), 1365(a) provides:

§ 1323. Federal facilities pollution control.

(a) Each department, agency, or instrumentality of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal * * * requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal dis-

trict court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 *et seq.* of title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. The President may exempt any effluent source of any department, agency, or instrumentality, in the executive branch from compliance with any such a [sic] requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regula-

tions exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

Clean Water Act Section 505(a), 33 U.S.C. 1365 (a):

§ 1365. Citizen suits.

(a) Authorization; jurisdiction.

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the

Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

2. Sections 6001 and 7002(a) of RCRA, 42 U.S.C. 6961, 6972, provide:

§ 6961. Application of Federal, State, and local law to Federal facilities.

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of soild waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court, with respect to the enforcement of any such injunctive relief. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropria-

tion unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemption from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

§ 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section and section 1319(g)(6) of this title, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(2) against the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transpor-

tation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(3) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court for the District of Columbia. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under sections 6928(a) and (g) of this title.

3. Ohio Rev. Code Ann. § 3734.13(C), as amended 1985 Ohio Laws 2295, provides:

§ 3734.13 Enforcement orders; emergency orders; procedure upon violation.

* * * *

(C) If the director determines that any person is violating or has violated this chapter, a rule adopted thereunder, or a term or condition of a permit issued thereunder, the director may, without prior issuance of an order, request in writing that the attorney general bring a civil action for appropriate relief, including a temporary restraining order, preliminary or permanent injunction, and civil penalties in any court of competent jurisdiction. Such an action shall have precedence over all other cases. The court may impose upon the person a civil penalty of not more than ten thousand dollars for each day of each violation of this chapter, a rule adopted thereunder or a term or condition of a permit issued thereunder, which moneys shall be paid into the hazardous waste clean-up fund created in section 3734.28 of the Revised Code.

Any action under this section is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.

4. Ohio Rev. Code Ann. § 6111.09 (Anderson Supp. 1987) provides:

§ 6111.09 Penalty paid to state treasury; ~~removal of nonconforming product.~~

Any person who violates section 6111.07 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars per day of violation. The attorney general, upon written request by the director of environmental protection, shall commence an action under this section against any person who violates section 6111.07 of the Revised Code. Any action under this section is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.

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MAR 26 1991
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No. 90-1341

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF ENERGY,
Petitioner,

v.

STATE OF OHIO, et al.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

This case was brought in the district court and litigated in the Court of Appeals by the State of Ohio on the relation of its Attorney General, Anthony J. Celebrezze, Jr. succeeded by Lee Fisher. The Defendants-Appellants before the Court of Appeals were the U.S. Department of Energy and Secretary of Energy James D. Watkins.

TABLE OF CONTENTS

PAGE

PARTIES TO THE PROCEEDINGS i

TABLE OF AUTHORITIES v

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

I. **DOE's Lengthy Record Of Noncompliance With The Hazardous Waste Laws Illustrates Congress' Reasons For Subjecting Federal Facilities To Civil Penalties For Violations Of The Hazardous Waste Laws** 1

II. **DOE's Disregard Of Its State And Federal Water Pollution Obligations Has Been Longstanding And Continuous** 2

III. **The State Requested Civil Penalties In Order To Deter DOE From Violating Both State And Federal Law** 3

REASONS FOR DENYING THE PETITION 4

I. **The Court of Appeals' Rulings In Favor Of The State Followed The Rules Of Statutory Construction Applicable To Waivers Of Sovereign Immunity By Respecting The Intent Of Congress, Rather Than Inventing Strained, Improbable Meanings For The Terms Used In The Statutes** 4

II. **Because Penalties Are Necessary To Convince Federal Polluters To Comply With The Law, Penalties Are An Essential Component Of Comprehensive Congressional Programs To Reduce And Eliminate Pollution** 5

PAGE

III. Rather Than Being An Unusual Step, Congress' Imposition Of Penalties On Federal Agencies Is Not Only A Logical, But An Essential, Part Of Congress' Plan To Stop Federal Facility Pollution By Deterring Illegal Conduct 8

IV. Because The States Have Exercised Restraint In Pursuing Civil Penalties Against Federal Agencies, DOE's Accusation About State Raids On The Federal Treasury Is Unwarranted 9

V. The Court of Appeals Below Correctly Held That Both The Language And Legislative History Of The RCRA Citizen Suit Provision Express Congressional Intent To Penalize Federal Agencies For Illegal Hazardous Waste Conduct. No Court of Appeals Has Construed This Provision To The Contrary 11

VI. The Court Of Appeals Below Correctly Held That Ohio's Civil Penalties Arise Under Federal Law, Since Ohio's Water Pollution Prevention Program and Penalties Originated From The Clean Water Act 14

A. Contrary To DOE's Contention, It Is Well-Settled That The Term "Sanctions" Includes Civil Penalties 14

B. Because The Court Below Correctly Found That Federally Mandated And Approved Penalties Arise Under Federal Law, And Because The Ninth Circuit Decision Did Not Address This Issue In The Context Of Sovereign Immunity, Review Of This Question By This Court Is Not Merited At This Time 15

PAGE

CONCLUSION 18

APPENDIX A-1

TABLE OF AUTHORITIES PAGE

CASES **PAGE**

California v. Dep't. of the Navy, 845 F.2d 222 (9th Cir. 1988) 17, 18

Canadian Aviator v. United States, 324 U.S. 215 (1945) 5

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 15

Franchise Tax Bd. of Cal. v. U.S. Postal Service, 467 U.S. 512 (1984) 4

Kosak v. United States, 465 U.S. 848 (1984) 4, 14

MESS v. Weinberger, 655 F.Supp. 601 (E.D. Cal. 1986) 13

Oceanic Steam Navigation Co. v. Stranaham, 214 U.S. 320 (1908) 6

Philbrook v. Glodgett, 421 U.S. 658 (1975) 4

State of Alabama v. Veterans Administration, 648 F.Supp. 1208 (M.D. Ala. 1986) 10

State of Ohio v. Air Force, 17 Env'tl. L. Rep. (BNA) 21210 (S.D. Ohio 1987) 10

United States v. Air Pollution Control Board of Tenn., no. 3:88-1030 (M.D. Tenn. March 2, 1990) 10

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 6

United States v. Testan, 424 U.S. 392 (1976) 5, 14

PAGE

United States v. Turkette, 452 U.S. 576 (1981) 4

United States v. Ward, 448 U.S. 242 (1980) 15

United States v. Washington, 872 F.2d 874 (9th Cir. 1989) 12, 13

United States v. Yellow Cab Co., 340 U.S. 543 (1951) 4, 5

STATUTES, RULES AND REGULATIONS

CLEAN WATER ACT (CWA), 33 U.S.C. 1251 *et seq.*:

33 U.S.C. 1251(b) 7, 16

33 U.S.C. 1311(i) 16

33 U.S.C. 1319 17

33 U.S.C. 1319(a) 16

33 U.S.C. 1319(c) 16

33 U.S.C. 1319(d) 16

33 U.S.C. 1323 ..... 7, 14, 15

33 U.S.C. 1342 13

33 U.S.C. 1342(b) 16

33 U.S.C. 1342(b)(7) 16, 17

33 U.S.C. 1342(c)(1) 16

33 U.S.C. 1342(c)(2) 16

33 U.S.C. 1342(k) 16

33 U.S.C. 1365(a) 3

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), 42 U.S.C. 6901 *et seq.*

42 U.S.C. 6972 14

42 U.S.C. 6972(a) 3, 12, 13

OHIO REVISED CODE

O.R.C. 3734.13(C) 3

O.R.C. 6111 17

O.R.C. 6111.03 17

O.R.C. 6111.09 ..... 3, 17

MISCELLANEOUS

S. Rep. No. 370, 95th Cong., 1st Sess. (1977) 7

S. Rep. No. 414, 92d Cong., 2d Sess. (1972) 6, 7

S. Rep. No. 988, 94th Cong., 2d Sess. (1976) 14

S. Rep. No. 284, 98th Cong., 1st Sess. (1983) 11

Conf. Rep. No. 1133, 98th Cong., 2d Sess. (1984) 12

Black's Law Dictionary 1203 (Rev. 5th Ed. 1979) 15

Webster's New World Dictionary, 2d Ed 16

STATUTORY PROVISIONS INVOLVED

The State concurs with the statement of statutory provisions provided by the Department of Energy Petition, with one exception. Because there are minor errors in the text of 42 U.S.C. 6972 as set forth in the Appendix to the DOE Petition, the State has printed the text of that statutory section in the Appendix attached hereto.

STATEMENT OF THE CASE

In March of 1986, the State of Ohio filed suit against the U.S. Department of Energy ("DOE") for widespread and longstanding violations of the state and federal pollution laws. For several years, DOE had been engaged, and was continuing to engage itself, in illegal acts which flaunted both the hazardous waste and water pollution laws. These illegal activities took place at DOE's Feed Materials Production Center (FMPC), also commonly known as the Fernald facility, located near Cincinnati.

I. DOE's Lengthy Record Of Noncompliance With The Hazardous Waste Laws Illustrates Congress' Reasons For Subjecting Federal Facilities To Civil Penalties For Violations Of The Hazardous Waste Laws.

The Complaint describes thirteen types of hazardous waste safety standards which DOE has violated at the FMPC. Counts Three - Fifteen. DOE illegally dumped hazardous waste into a waste pit, allowed hazardous waste to leak from an illegal drum storage site, and carried on other illegal hazardous waste activities. Count Three and Paragraphs 18-23.

Although all hazardous waste facilities have been required since 1981 to install adequate monitor wells to detect hazardous waste constituents leaking into the groundwater, the Complaint recounts that DOE had not yet complied with this standard five years later. Count Seven. Contamination is believed to be coming from the illegal hazardous waste

disposal pit. Count Five.

To compound the fact that treatment, storage, and disposal of hazardous waste at the FMPC was illegal, DOE did not bother to manage the hazardous waste with even a modicum of safety. While the rules required hazardous waste facilities to be regularly inspected for health hazards, DOE for 3 ½ years failed to do so. Count Ten. While the rules required aisle space between drums of waste so that operators could see leakage and other problems, and so that spill and fire fighting equipment could be moved around the drums, DOE disregarded this requirement. Count Eleven. While the rules required an emergency contingency plan to inform workers how to safely respond to fires, explosions, and releases of hazardous waste, DOE ignored this precaution for 3 ½ years. Count Twelve. DOE failed to teach its workers how to safely handle hazardous waste (Count Fourteen), to write a proper closure plan (Count Eight), or to analyze its waste so it would know how to safely manage it (Count Fifteen). In short, DOE widely disregarded the rules of both the hazardous waste authorities and common sense.

II. DOE's Disregard Of Its State And Federal Water Pollution Obligations Has Been Longstanding And Continuous.

By the time the Compiaint was filed, DOE had subjected the Great Miami River and Paddy's Run to illegal concentrations of hexavalent chromium, total chromium, copper, iron, ammonia, suspended solids, and oil and grease for two and one-half years. Count Seventeen. Excessive contaminants were discharged into the Great Miami for years as a result of DOE's disdain for the schedule in its permit requiring the construction and operation of new pollution abatement equipment by June 30, 1984. Counts Eighteen through Twenty-Three. This pollution continued even after the lawsuit was filed. Because DOE had fallen so far behind on equipment installation, the consent decree now enjoins compliance by 1990, six years late. Consent Decree, Para. 4.4, 4.5.

III. The State Requested Civil Penalties In Order To Deter DOE From Violating Both State And Federal Law.

The State realized that injunctive relief alone would not provide DOE with the motivation necessary to persuade the Department to obey the law in the future. An injunction alone would have done little more than require DOE to stop its illegal activities, and then only after protracted litigation, rather than punishing DOE for violating the law. The State realized that DOE would have little incentive to voluntarily comply with the law in the future unless the Department realized it could be penalized for violating the law.

To encourage not only DOE, but other federal agencies as well, to voluntarily comply with the law, the State requested civil penalties to address DOE's irresponsible behavior at the Fernald plant. Because both federal and state laws were being violated, the State utilized the penalty provisions of both state and federal statutes. As a result, the State presented civil penalty causes of action to the district court pursuant to the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. 6972(a)) and pendent state law, (O.R.C. 3734.13(C)) for hazardous waste violations and the citizen suit provision of the Clean Water Act (33 U.S.C. 1365(a)) and pendent state law (O.R.C. 6111.09) for water pollution violations.

DOE responded by attempting to exempt itself from civil penalties by invoking the age-old doctrine of sovereign immunity. The district court rejected all of DOE's contentions, finding in the language and legislative history of RCRA and the Clean Water Act a clear Congressional intent to waive immunity from both federal and state hazardous waste and water pollution civil penalties. The court of appeals affirmed. While the appellate court erroneously found no waiver for state hazardous waste penalties (see the State's Cross-Petition), the court did find a waiver for federal hazardous waste penalties and state water pollution penalties.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals' Rulings In Favor of the State Followed The Rules Of Statutory Construction Applicable To Waivers Of Sovereign Immunity By Respecting The Intent Of Congress, Rather Than Inventing Strained, Improbable Meanings For The Terms Used In The Statutes.

When interpreting a waiver of sovereign immunity, the responsibility of the courts is to ascertain congressional intent and to effectuate it. *Philbrook v. Glodgett*, 421 U.S. 658, 713 (1975). The courts are not to adopt a "crabbed construction" to restrict a waiver or to insist that Congress use "a ritualistic formula" to waive immunity. *Franchise Tax Bd. of Cal. v. U.S. Postal Service*, 467 U.S. 512, 521 (1984). Instead, the scope of a waiver can be ascertained only by reference to "underlying congressional policy." *Id.*

When determining the meaning of a waiver, the courts assume that legislative intent is expressed by the ordinary meaning of the words used in the statute. *Kosak v. United States*, 465 U.S. 848, 853 (1984); *United States v. Yellow Cab Co.*, 340 U.S. 543, 548 (1951). This Court has consistently declined to depart from the plain meaning of statutory language absent clear indication of contrary legislative intent. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Where the language of a statute broadly waives sovereign immunity, the courts may not whittle it down by resorting to a review of legislative history or other refinements. *Yellow Cab*, 340 U.S. at 549-50.

In its Petition, DOE invites the Court to formulate a new rule of statutory construction for this case, a standard so strict that no waiver could withstand scrutiny. DOE demands that a rule of "narrow construction" be used to interpret waivers, thus insisting that the Court go out of its way to find a meaning that would defeat waivers otherwise clear on their face. DOE Pet., p. 16.

However, the Court has never held Congress to such an

impossible standard. Not a single decision from the Court has ruled that a waiver must be so clear that it admits of no other possible interpretation. Instead, the courts must determine whether or not the waiver "can fairly be interpreted" as creating government liability. *United States v. Testan*, 424 U.S. 392, 400 (1976). When authority to file suit is given, this consent is liberally construed. *Yellow Cab*, 340 U.S. at 555.

Where Congress has provided a broad waiver of immunity, the scope of the waiver must not be narrowly limited by a court's construction of its terms. *Canadian Aviator v. United States*, 324 U.S. 215 (1945). Congressional intent is not to be "thwarted by an unduly restrictive interpretation." *Id.*

In its decision, the court of appeals correctly noted that it had to avoid the temptation to seek any hint of ambiguity that might be used to twist the statute into denying an intended waiver. App. to DOE Pet., p. 3a. Once the intent of the legislative branch has been ascertained, that intent should be respected rather than undercut by aggressively contriving some other possible interpretation. Except where the court of appeals went out of its way to look for another "plausible" interpretation to defeat Congress' intended waiver for state hazardous waste penalties (see the State's Cross-Petition), the court of appeals honored Congressional intent by construing the waivers according to their language and legislative history. This Court should turn back DOE's invitation to formulate a new "narrow construction" rule of statutory construction for waivers. This invitation is contrary to all of the decisions on sovereign immunity and would only serve to harm the public Congress intended to protect by enacting the waivers.

II. Because Penalties Are Necessary To Convince Federal Polluters To Comply With The Law, Penalties Are An Essential Component Of Comprehensive Congressional Programs To Reduce And Eliminate Pollution.

The courts have long recognized that civil penalties are

an effective mechanism to enforce the law. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *Oceanic Steam Navigation Co. v. Stranaham*, 214 U.S. 320 (1908). A civil penalty will deter the violator from violating the law again. *ITT*, 420 U.S. at 231-32.

Accordingly, the legislative history of the Clean Water Act shows that Congress regarded civil penalties and other sanctions as an indispensable component of its comprehensive water pollution abatement program. In fact, Congress attributed the failure of its pre-1972 water pollution laws in part to the lack of sanctions imposed for noncompliance with them. S. Rep. No. 414, 92d Cong., 2d Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3730-31.

As a result of this need for enforcement, Congress has generally provided for both criminal and civil penalties to enforce its environmental statutes, including the Clean Water Act and RCRA. Furthermore, where a state is given the authority to administer the federal pollution control program under either of these statutes in lieu of the federal government, it is a *mandatory* prerequisite of federal law that these states first enact criminal and civil penalty provisions to enforce these programs.

If violators cannot be penalized for past misconduct, they will have little incentive to comply with the law until a court orders them to comply. In effect, until a lawsuit is filed against him, a violator has a "free" period of noncompliance during which he can violate the law with impunity. Only if faced with penalties for noncompliance will many polluters comply without forcing the government to sue them. This sorry reality was Congress' motivation for insisting that penalties be used to encourage voluntary compliance.

While investigating pollution practices, Congress found that federal agencies were not doing their share to control pollution. For example, during its consideration of the 1972 water pollution law, Congress was alarmed to find "many incidents of flagrant violations" of air and water pollution

laws by federal facilities. S. Rep. No. 414, 92d Cong., 2d Sess. 67, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3733-34. Part III of the State's Cross-Petition describes in more detail the widespread defiance by federal agencies to the pollution control laws and their resort to litigation to fight state efforts to reduce their pollution.

Due to its dissatisfaction with the noncompliance record of federal facilities, Congress included 33 U.S.C. 1323 in the 1972 amendments to the Clean Water Act. S. Rep. No. 414 at 67-68, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 3733-34. 33 U.S.C. 1323 waived immunity for state water pollution laws as well as federal laws. Such a waiver for state law was essential, since the act gave the states the primary role in abating water pollution and limited U.S. EPA to a supervisory role. 33 U.S.C. 1251(b). Federal facilities, then, could no longer ignore their water pollution control obligations under either state or federal law.

However, while considering the Clean Water Act Amendments of 1977, Congress found that federal agencies were continuing to ignore federal, state, and local water pollution laws despite the 1972 waiver in 33 U.S.C. 1323. Furthermore, these agencies were obtaining court decisions exempting them from various water pollution requirements under the guise of sovereign immunity.

As a result, Congress amended 33 U.S.C. 1323 to expressly authorize sanctions against federal facilities to give them incentive to comply. S. Rep. No. 370, 95th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Ad. News 4392. In the meantime, Congress had also enacted RCRA in 1976. Upon hearing of continuing widespread federal disregard for the previously enacted water and air laws, Congress in RCRA also expressly waived all immunity from enforcement of state and federal hazardous waste laws.

Unfortunately, even the explicit waivers in 1976 and 1977 did little to encourage federal agencies to comply. Confident in their ability to obtain deferential immunity decisions from the courts, federal agencies continued their old pollution

practices even as private industry was shouldering its share of pollution control. Because federal agencies have believed they can convince the courts to read civil penalties out of the waivers, they have had little incentive to obey the law.

DOE, in an attempt to convince the Court that it should be immune from the deterrent effect of civil penalties, encourages the Court to accept its petition and to read holes into the Clean Water Act and RCRA civil penalty provisions through which it may slip. As the State will explain below, acceptance of DOE's invitation would do more than let DOE escape responsibility for its disgraceful conduct - it would also repudiate the language of these statutes and defeat Congress' intent to comprehensively stop pollution by federal agencies. The Court should not encourage further DOE misbehavior by granting its petition.

III. Rather Than Being An Unusual Step, Congress' Imposition Of Penalties On Federal Agencies Is Not Only A Logical, But An Essential, Part Of Congress' Plan To Stop Federal Facility Pollution By Deterring Illegal Conduct.

The federal executive branch has been waging a nationwide campaign to have the civil penalty provisions of both federal and state environmental statutes declared inapplicable to federal facilities. Obviously, if federal facilities were not highly disturbed at the prospect of being penalized for their violations, they would not be spending so much effort to avoid liability. The alarm shown by DOE and other federal agencies demonstrates that civil penalties will be an effective, indeed, the only effective way, to finally coerce responsibility from them.

A penalized federal agency must pay the penalty from either the federal government's Judgment Fund or the money appropriated to that agency. In the case of the latter, the agency loses use of the money regardless of whether the

money is paid to the state or to another account in the U.S. Treasury.

However, the prospect of being penalized for violating the law has an importance to federal facilities which goes beyond merely losing the money they are ordered to pay. The assessment of a civil penalty is a public declaration that the defendant agency has violated the law. Payment of such a penalty will focus attention on the wayward agency by the executive branch and Congress, which will hopefully make inquiries into the agency's wrongdoings and take steps to prevent the recurrence of these wrongdoings. The publicity generated by this undesired attention will convince other federal agencies to straighten up.

In its Petition, DOE argues that this Court should hear this case because Congress could not have intended to have federal agencies pay civil penalties into the United States Treasury pursuant to a citizen suit. However, the agency's loss of money from its account and the extra public scrutiny demonstrates that an agency has real incentive to comply if penalties can be assessed. Because Congress was well aware that penalties would be an effective means to finally capture the attention of recalcitrant federal agencies, Congress' waiver of immunity should be interpreted in light of that knowledge. In light of federal agencies' stubborn refusal to comply with Congress' laws, it was not unusual to see Congress resort to penalties to finally force them to obey the law. Therefore, the Court should not grant DOE's Petition just because DOE asserts that Congress could not have intended to penalize federal agencies.

IV. Because The States Have Exercised Restraint In Pursuing Civil Penalties Against Federal Agencies, DOE's Accusation About State Raids On The Federal Treasury Is Unwarranted.

As it has done previously during this litigation, DOE raises the spectre of state raids on the federal treasury in hopes of convincing the Court that Congress could not have meant

to penalize federal agencies for their illegal behavior. DOE insultingly characterizes state enforcement as a fundraising gimic rather than as a necessary remedy for federal misbehavior. DOE Pet., pp. 16-17. This ploy has been successful in the Ninth and Tenth Circuits, where the courts have accepted the executive branch's invitation to ignore clearly expressed Congressional intent. By including this wild allegation in its Petition, DOE seeks to convince the Court that review is necessary to save the federal treasury.

Contrary to DOE's scenario, the states undertake enforcement against a federal agency only where no other alternative will be effective. States have much easier methods for obtaining revenue than undergoing intense, draining litigation against uncooperative federal agencies.

In fact, this is the first civil penalty waiver case to reach the petition stage under either RCRA or the Clean Water Act even though the relevant waivers were enacted in 1976 and 1977. That only one such case has reached the Court in fourteen (14) years is testimony to the restraint exercised by states in these matters.

The states' restraint in penalizing federal agencies is also demonstrated by their enforcement of the air pollution laws. Even the 1979 Comptroller General opinion cited in footnote 21 of DOE's Petition acknowledges that the Clean Air Act waives federal immunity for air pollution civil penalties. Despite the existence of this clear waiver since 1977, the State is aware of only three cases in which states have pursued the penalties option for federal air pollution violations. *State of Alabama v. Veterans Administration*, 648 F.Supp. 1208 (M.D. Ala. 1986); *State of Ohio v. Air Force*, 17 Env'tl L. Rep. (BNA) 21210 (S.D. Ohio 1987) (appeal voluntarily dismissed); *U.S. v. Air Pollution Control Board of Tenn.*, unreported case no. 3:88-1030 (M.D. Tenn. March 2, 1990) (appeal voluntarily dismissed). Since all three states were successful in overcoming sovereign immunity defenses in those cases, the paucity of state air pollution penalty cases against federal agencies during the past fourteen years shows that DOE's inflammatory treasury raid scenario does

not occur even where the federal government has admitted that the states can obtain penalties.

Therefore, preservation of the federal treasury is not a factor which should dictate the granting of DOE's petition. DOE's Petition should be denied.

V. The Court of Appeals Below Correctly Held That Both The Language And Legislative History Of The RCRA Citizen Suit Provision Express Congressional Intent To Penalize Federal Agencies For Illegal Hazardous Waste Conduct. No Court of Appeals Has Construed This Provision To The Contrary.

The court below accurately acknowledged the obvious Congressional intent to waive sovereign immunity for federal hazardous waste penalties. In fact, the legislative history of the RCRA citizen suit provision expressly and unambiguously explains that federal agencies are subject to civil penalties:

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and *penalty provisions of section 7002.* [42 U.S.C. 6972]. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, *including the United States* . . ."

S. Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). (emphasis added). Congressional intent to subject federal facilities to civil penalties in citizen suits cannot be expressed more clearly.

The language of the citizen suit provision is equally clear. This provision explicitly authorizes lawsuits "against any person, (including (a) the United States)".

The above-quoted Senate report language shows that, when Congress expanded the citizen suit provision to add

assessment of civil penalties, it was well aware that the definition of "person" in that provision included the United States. Defining the United States as a "person" in the same section containing the citizen suit penalty authorization was meant to "assure that there is no confusion" about the courts' ability to penalize the United States. That this was the intent of the entire Congress became evident when the conference committee adopted the Senate's version of 42 U.S.C. 6972(a) word-for-word, saying, "The conference substitute adopts the Senate amendment . . ." (with additions to other subsections of the citizen suit provision not related to the issue at hand). Conf. Rep. No. 1133, 98th Cong., 2d Sess. 117 (1984), *reprinted in* 1984 U.S. Code Cong., & Ad. News. 5688-89. Congress then passed the same language, with "person" being defined to include the United States.

Because the citizen suit provision itself defines the term "person" to mean the United States, there is no need to have a second definition in another portion of the statute. Therefore, DOE's argument that the general definition section of the act also had to define "person" to include the United States is without merit. As the court of appeals below aptly noted, the citizen suit provision incorporates by reference the penalty provisions of Sections 3008, not vice versa. Therefore, the definition of "person" within the citizen suit provision is the applicable one. The above-quoted language from the Senate report also makes this clear by declaring that the definition of "person" in the citizen suit provision continues to include the United States to "assure that there is no confusion" about Congressional intent to penalize federal agencies for illegal conduct.

Because no other court of appeals has ruled on this issue, the Sixth Circuit's opinion cannot possibly conflict with a decision of another circuit. In fact, when the Court of Appeals for the Ninth Circuit originally wrote its opinion in *U.S. v. Washington,* 872 F.2d 874 (1989), that court had the following to say about the citizen suit waiver:

> The express waiver of sovereign immunity regarding civil actions filed by a citizen contained

> in section 6972(a)(1)(A) demonstrates unequivocally that Congress knows how to waive immunity from civil penalties when it wants to.

Slip opinion, pg. 3649 (Attachment F to the State's Court of Appeals Brief). Although interested *amici* states and the Department of Justice had fully briefed this issue in *Washington*, the Ninth Circuit later replaced these words with noncommittal language after Justice moved for reconsideration on the grounds that this issue was not before the court. Notwithstanding Justice's protests and the Ninth Circuit's obliging response, the original language shows that a frank examination of this "express waiver of sovereign immunity" discloses Congressional intent to have civil penalties assessed against federal facilities.

The only other court known by the State to have construed this penalty section with regard to federal agencies was a district court in *MESS v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986). The *MESS* court sought to impose its own drafting preferences on Congress by refusing to respect Congressional intent simply because the definition of "person" does not appear in the general definitions section. The main excuse for disregarding Congressional intent appears to be the *MESS* court's surprise that the states would be allowed to penalize a federal agency when the statute did not authorize U.S. EPA to do it. However, the statute does not authorize U.S. EPA to penalize other federal agencies simply because the U.S. Department of Justice prohibits sister federal agencies from suing each other.

Contrary to this Court's admonition to respect Congressional intent, the *MESS* court went out of its way in an attempt to find an ambiguity to defeat Congressional intent to waive. The excuse used by the *MESS* court to disregard Congressional intent thus should give way to the well-reasoned decision on this issue by the court of appeals below.

DOE's petition blasts the court of appeals for its "bald assertion" that application of penalties to the United States

is the "fairest reading" of the citizen suit provision. Pet. at 28. Yet this Court has previously used an almost identical phrase when it mandated the federal courts to determine whether a statute "can fairly be interpreted" as creating government liability. *Testan*, 424 U.S. at 400. Moreover, penalty authorization against federal agencies under this provision is not just its "fairest" reading. It is the only interpretation possible without ignoring the words and intent of Congress.

Combining the explicit language of 42 U.S.C. 6972, defining the United States as a "person" subject to penalties, with the statement of legislative history that "a noncomplying agency . . . [is] subject to the citizen suit and penalty provisions of section 7002," there can be no doubt about Congressional intent. Added to this is Congress' intent to treat federal facilities just like private citizens in order to protect the effectiveness of the comprehensive hazardous waste program. S. Rep. No. 988, 94th Cong., 2d Sess. 23-24 (1976). Given the clarity of Congressional intent and a lack of conflicting caselaw from other courts of appeals, this Court should decline to hear this matter. Rather than accepting DOE's invitation to innovatively add ambiguity to the statute, the Court should reject DOE's attempt to prolong its escape from liability for its wrongdoings.

VI. The Court Of Appeals Below Correctly Held That Ohio's Civil Penalties Arise Under Federal Law, Since Ohio's Water Pollution Prevention Program and Penalties Originated From The Clean Water Act.

A. Contrary To DOE's Contention, It Is Well-Settled That The Term "Sanctions" Includes Civil Penalties.

The Clean Water Act waiver provides that federal agencies are subject "to any process and sanction, whether enforced in federal, state or local courts or in any other manner." 33 U.S.C. 1323(a). Therefore, federal agencies and officers are subject to civil penalties if civil penalties are a form of sanction

in the plain and ordinary usage of that word. *Kosak*, 465 U.S. at 853. In order to ascertain the plain and ordinary meaning of a word, the courts frequently rely upon the use of dictionary definitions. *Cf, Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 fn. 20 (1976).

Black's Law Dictionary defines "sanction" as:

> . . . The part of a law which is designed to secure enforcement *by imposing a penalty for its violation*
> . . . .

(Emphasis added.) Black's Law Dictionary 1203 (Rev. 5th Ed. 1979). The court of appeals below cited a similar definition from another dictionary. *See* also, the language of this Court in *United States v. Ward*, 448 U.S. 242, 249 (1980) (". . .Congress labelled the sanction authorized in 311(b)(6) [of the Clean Water Act] a 'civil penalty'. . ."). Thus, it is very clear that the common usage of the word "sanction" is a description of the penalty that is imposed on someone who has violated the law. Obviously, civil penalties fit within that description.

Significantly, the last sentence of 33 U.S.C. 1323 specifically exempts federal *officers* from civil penalties for official duties, an exemption which would be unnecessary if the previous language of the section had not generally waived liability for civil penalties. DOE's protestation to the contrary, the Court should not encumber its schedule to review such a settled question.

B. Because The Court Below Correctly Found That Federally Mandated And Approved Penalties Arise Under Federal Law, And Because The Ninth Circuit Decision Did Not Address This Issue In The Context Of Sovereign Immunity, Review Of This Question By This Court Is Not Merited At This Time.

Another clause in 33 U.S.C. 1323 provides that federal agencies are liable "only for those civil penalties arising

under Federal law. . . ." "Arising under" Federal law is not the same as *being* a Federal law. The word "arise" means to "originate" or "come into being." *Webster's New World Dictionary*, 2d Ed. There can be no doubt that Ohio's penalties originate under or have come into being under federal law.

In 33 U.S.C. 1342(b), Congress authorized the states to implement the Clean Water Act by administering the federal water pollution program. The Clean Water Act specifically requires the state to abate violations through the use of civil penalties and other means of enforcement. 33 U.S.C. 1342(b)(7). The Act provides that the state permit program shall be implemented "in accordance with" 33 U.S.C. 1342. 33 U.S.C. 1342(c)(2). The state then assumes responsibility for implementing the Section 402 permit program *on behalf of and in lieu of U.S. EPA*. 33 U.S.C. 1342(c)(1). Compliance with the state permit constitutes compliance with the Clean Water Act. 33 U.S.C. 1342(k). As the court of appeals aptly noted below, compliance with federally approved state law *is* compliance with the Clean Water Act. App. to DOE Pet., p. 7a. Therefore, the entire permit program, including its civil penalty provisions, originates or arises from federal law.

Approved state programs thus *replace* federal implementation of the Clean Water Act. Adding to the federal character of the permits issued by states under approved programs is the fact that U.S. EPA can directly enforce the permits *as federal requirements*. 33 U.S.C. 1319(a).

As the court below noted, the introductory section of the Clean Water Act makes it clear that state permit programs arise *under* federal law by declaring:

> It is the policy of Congress that the States . . . implement the permit programs *under* sections 402 and 404 of this Act.

33 U.S.C. 1251(b) (emphasis added). In several other sections, Congress refers to a "permit issued *under* Section 402 of this Act . . . by a State" (emphasis added) or uses similar language. 33 U.S.C. 1319(a); 33 U.S.C. 1319(c); 33 U.S.C.

1319(d); 33 U.S.C. 1311(i). The legislative history of the Act repeatedly uses the same language. Obviously, Congress regarded state permit programs as arising *under* federal law (the Clean Water Act).

Ohio's approved water pollution program and penalties were created for the specific purpose of implementing the Clean Water Act. O.R.C. 6111.03. In fact, O.R.C. Chapter 6111 contains no fewer than 33 references to the Clean Water Act in the course of implementing the Act. The penalties specified in O.R.C. 6111.09 are not only authorized, but *mandated*, by federal law. 33 U.S.C. 1342(b)(7).

DOE's Petition postulates that federal approval of Ohio's permit program and penalties does not convert Ohio's penalties into federal law. However, neither the State nor the decision below have argued that O.R.C. 6111.09 has been *converted* into a federal law. Instead, O.R.C. 6111.09 penalties have arisen under, i.e., *originated or come into being under*, federal law. See the dictionary definition of "arise" provided above. Similarly, the legislative history citations provided in DOE's Petition simply mention that penalties are still implemented as state law rather than being converted into federal law. These citations do not contradict the State's position that the penalties originate under federal law.

The Ninth Circuit decision in *California v. Dep't of the Navy*, 845 F.2d 222 (9th Cir. 1988), also fails to reach the conclusion sought by DOE. In that case, California had attempted to enforce state penalties, not by asserting a cause of action pursuant to its state civil penalty provision, but by suing directly pursuant to 33 U.S.C. 1319 and 1342(b)(7). The Ninth Circuit ruled that these sections provided jurisdiction only for U.S. EPA lawsuits and that these sections did not turn into state law upon U.S. EPA approval of the state water pollution program. Although the Ninth Circuit did write some unfortunate language about the meaning of "arise under," its opinion makes it clear that the court was not reaching a sovereign immunity question, by declaring:

> Having determined that the § 309 does not provide an independent jurisdictional ground for the State's

> suit, we need not decide whether the language of §§ 309(d) and 313 contains the requisite explicit waiver of sovereign immunity to allow an action against the Navy.

Id., at 225, fn. 3. This case thus fails to provide the direct conflict in circuit decisions postulated by DOE to necessitate this court's review.

By arguing that Ohio's federally created, federally approved substitutive water pollution program does not "arise under federal law," DOE disregards completely the plain meaning of the phrase and makes its existence in the statute entirely meaningless. In light of the well-reasoned nature of the court of appeals' opinion below on this issue, and the lack of direct conflict with any other circuit, the Court should decline to grant DOE's Petition.

CONCLUSION

The U.S. Department of Energy's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LEE FISHER
ATTORNEY GENERAL OF OHIO

By: _____

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APPENDIX

Section 7002(a) of RCRA, 42 U.S.C. 6972(a), provides:

> (a) In general. Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
>
> (1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act; or
>
> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy

or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 3008(a) and (g).

(3)

No. 90-1341

FILED
MAY 8 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Case: Page

California v. *Department of the Navy*, 845 F.2d 222 (9th Cir. 1988) 2, 3, 4, 5

Sierra Club v. *Lujan*, No. 90-1183 (10th Cir. Apr. 30, 1991) 4

Statutes:

Clean Water Act, 33 U.S.C. 1251 *et seq.*:

§ 309(d), 33 U.S.C. 1319(d) 3

§ 313, 33 U.S.C. 1323 2

§ 313(a), 33 U.S.C. 1323(a) 4

§ 402(b)(7), 33 U.S.C. 1342(b)(7) 4

31 U.S.C. 3302 3

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1341

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Contrary to respondents' assertion, federal agencies have not "wag[ed] a nationwide campaign" (Br. in Opp. 8) to stymie state efforts to control pollution. In each case cited in the petition or brief in opposition adjudicating the liability of federal agencies to civil penalties under RCRA or the CWA, the State sued the United States or a federal agency for civil penalties. See Pet. 20, 21 & n.12, 25. The federal entity—the defendant in the case—asserted what it believed to be the valid defense of sovereign immunity. Indeed, as the petition makes clear and as the brief in opposition essentially concedes (Br. in Opp. 7-8, 10), most of the decisions in those cases have agreed with the United States that the court did not (as respondents would have it) have to "read civil penalties out of the waivers" (*id.* at 8) because provision for those penalties was never included in the waivers in the first place.

More fundamentally, we disagree with respondents' insistence (Br. in Opp. 5-8) that, because Congress

generally believed civil penalties to be an effective tool in cleaning up the environment, Congress must have intended that tool to be available against federal agencies. See Pet. 17-18. Federal agencies do not occupy the same position as do private entities with respect to civil penalties paid to a state or federal treasury. In this case, for example, the CWA federal facilities provision expressly recognizes the sensitivity of the federal-state relationship by making clear that, even if Congress were to waive immunity from federal civil penalties, there is no waiver for civil penalties that do not "aris[e] under Federal law." 33 U.S.C. 1323. The fact that the Sixth Circuit's judgment threatens to intrude into the state-federal relationship suggests that further review of the judgment by this Court is warranted.

2. Respondents also contend (Br. in Opp. 17-18) that the Ninth Circuit's decision in *California* v. *Department of the Navy*, 845 F.2d 222 (1988), does not conflict with the Sixth Circuit's decision here. According to respondents, *California* v. *Department of the Navy*, *supra*, is distinguishable from this case because "California had attempted to enforce state penalties, not by asserting a cause of action pursuant to its state civil penalty provision, but by suing directly pursuant to 33 U.S.C. 1319 and 1342(b)(7)." Br. in Opp. 17. Respondents cite a footnote in which the Ninth Circuit stated:

> Having determined that * * * § 309 [, 33 U.S.C. 1319,] does not provide an independent jurisdictional ground for the State's suit, we need not decide whether the language of §§ 309(d) and 313 contains the requisite explicit waiver of sovereign immunity to allow an action against the Navy.

845 F.2d at 225 n.3.

Respondents' suggested distinction fails to refute the existence of a square conflict between the Sixth and Ninth Circuits. It overlooks the fact that in *California* v. *Department of the Navy*, California advanced two distinct theories, and the Ninth Circuit rejected each of them.

The first theory—which is not the basis for the conflict presented in our petition—was that the CWA civil penalties provision, CWA § 309(d), 33 U.S.C. 1319(d), "in conjunction with § 313, [the CWA federal facilities provision], provides an independent jurisdictional ground for a state to seek civil penalties against federal dischargers." 845 F.2d at 224. The Ninth Circuit rejected that theory on the ground that the CWA civil penalties provision does not provide for a State—as opposed to the EPA—to bring a suit for CWA civil penalties. *Id.* at 224-225. Having thus decided that a State is not a proper plaintiff in a CWA civil penalties case, the court reserved in the footnote quoted above the further question whether in any event sovereign immunity would bar application of the CWA civil penalties provision to a federal defendant. *Id.* at 225 n.3.

Significantly, the civil penalties addressed in that aspect of the Ninth Circuit's decision were penalties assessed pursuant to the CWA itself and thus payable to the federal treasury.[1] See 31 U.S.C. 3302. They were therefore unlike the civil penalties payable to the state treasury that are at issue with respect to the first question presented in our petition. Ac-

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[1] Respondents here did advance a claim in the courts below similar in some respects to the one rejected by the Ninth Circuit in that aspect of *California* v. *Department of the Navy*, *supra*. Respondents claimed that, if the federal facilities provision of the CWA does not waive federal sovereign immunity from state civil penalties, the CWA citizen suit and civil penalties provisions at least waive federal sovereign immunity

cordingly, there was no issue—with respect to those CWA civil penalties—as to whether they "aris[e] under Federal law."

The Ninth Circuit also, however, separately addressed California's additional theory that a State could sue a federal agency for civil penalties assessed pursuant to state environmental statutes (and payable to the State) because (a) the CWA itself requires state permit programs to include civil penalty provisions, see CWA § 402(b)(7), 33 U.S.C. 1342(b)(7), and (b) such state civil penalty provisions "fall within § 313, which subjects federal dischargers to civil penalties 'arising under' federal law." 845 F.2d at 225. That is precisely the claim made by the State of Ohio in this case. See Br. in Opp. 16. In contrast to the Sixth Circuit, the Ninth Circuit rejected that claim. The Ninth Circuit held that, notwithstanding the general statutory requirement that state permit programs include civil penalty provisions, such programs "are 'not a delegation of Federal authority,' but instead are state programs which 'function[] in lieu of the Federal program.'" 845 F.2d at 225. Accordingly, in rejecting California's second theory, the Ninth Circuit concluded that the State's position "would essentially nullify § 313(a)'s express limitation of civil penalties against federal agencies to those arising under federal law." *Ibid.*[2]

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from assessment of federal civil penalties. Neither court below specifically addressed that claim, but respondents have advanced it as a separate question presented in their cross-petition filed in this case (No. 90-1517). We have filed a separate response to the cross-petition.

[2] In its recent decision in *Sierra Club* v. *Lujan*, No. 90-1183 (Apr. 30, 1991), the Tenth Circuit agreed with the Sixth Circuit that Section 313(a) waived federal sovereign immunity from assessment of civil penalties. Accord *California*

The Ninth Circuit in *California* v. *Department of the Navy*, *supra*, thus did not merely "write some unfortunate language about the meaning of 'arising under.'" Br. in Opp. 17. Rather, the Ninth Circuit squarely addressed the issue and concluded that civil penalties assessed in accordance with state permit programs do not "aris[e] under Federal law" for purposes of the CWA's federal facilities provision—a decision directly contrary to that reached by the Sixth Circuit in this case. Moreover, the Ninth Circuit reached that result by rejecting precisely the argument advanced by respondents here and by accepting instead one of the arguments that we advanced unsuccessfully in the court below. See Pet. 23-25. The Ninth Circuit's reasoning and result are thus directly contrary to the reasoning and result of the Sixth Circuit here, and there is accordingly a square conflict in the circuits on the issue.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MAY 1991

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v. *Department of the Navy*, 845 F.2d at 225. Because the issue in *Sierra Club* involved *federal* penalties, however, the Tenth Circuit did not reach the question on which the Sixth and Ninth Circuits are divided—*i.e.*, whether civil penalties under *state* water pollution control laws "aris[e] under Federal law." See *Sierra Club*, slip op. 13, 15.

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Nos. 90-1341 and 90-1517

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

STATE OF OHIO, ET AL., CROSS-PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: FEBRUARY 22, 1991
CROSS-PETITION FOR A WRIT OF CERTIORARI FILED: MARCH 26, 1991
CERTIORARI GRANTED: JUNE 3, 1991

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1341

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

No. 90-1517

STATE OF OHIO, ET AL., CROSS-PETITIONERS

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UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS *

		Page
1.	Docket entries	1
2.	Complaint (filed March 11, 1986)	3
3.	Answer of federal defendants (filed April 29, 1988)	44
4.	Consent decree (entered December 2, 1988)	63
5.	Stipulation between DOE and Ohio relating to Ohio's Claims for Civil Penalties (filed December 2, 1988)	87
6.	Order granting certiorari in 90-1341	93
7.	Order granting certiorari in 90-1517	94

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* The opinion and judgment of the court of appeals, the order of the court of appeals denying rehearing, and the opinion of the district court are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
3/11/86	1	Complaint filed. Summons issued to pltfs counsel for service.
11/7/86	20	MOTION TO DISMISS and MOTION TO STAY CLAIM FOR NATURAL RESOURCE DAMAGES by U.S. Dept of Energy
3/18/88	74	ORDER (J. SPIEGEL) DENYING DEFT'S MOT. TO DISMISS.
4/29/88	83	ANSWER OF FEDERAL DEFTS.
8/3/88	89	MOTION TO AMEND the court's March 18, 1988 order and certify such order for interlocutory review under 28:1292.
9/23/88	92	ORDER GRANTING MOT. TO AMEND ORDER ENTERED MAR 18, 1988 & certifying such order for interlocutory review, etc.
12/2/88	94	STIPULATION between DEPT OF ENERGY & STATE OF OHIO to OHIO's claims for civil penalties.
12/2/88	95	CONSENT DECREE entered by J. Spiegel.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 89-3329 and 88-8350

STATE OF OHIO; ANTHONY J. CELEBREZZE, JR.,
Attorney General

v.

U.S. DEPARTMENT OF ENERGY

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/17/89	ORDER filed: defendant-petitioner's petition for permission to appeal is GRANTED * * *
6/11/90	OPINION filed: AFFIRMED * * *
6/11/90	JUDGMENT: AFFIRMED * * *
10/10/90	ORDER filed denying petition for en banc rehearing * * *
10/18/90	MANDATE ISSUED * * *

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-86-0217

STATE OF OHIO, EX REL. ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO
30 East Broad Street
Columbus, OH 43215, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF ENERGY
1000 Independence Ave., S.W.
Washington, D.C. 20585

and

JOHN S. HERRINGTON
Secretary of Energy
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585

and

NLO, INC.
P.O. Box 39158
Cincinnati, OH 45239

and

NL INDUSTRIES, INC.
1230 Avenue of the Americas
New York, NY 10020, DEFENDANTS

COMPLAINT

[Filed Mar. 11, 1986]

I. NATURE OF THE ACTION

1. This is a civil action brought by the State of Ohio on the relation of its Attorney General and at the re-

quest of the Director of Environmental Protection for injunctive relief, damages, civil penalties, and declaratory relief against the Defendants: the U.S. Department of Energy (hereinafter "DOE"), the Secretary of Energy (hereinafter "Herrington"), and their contractors at the Feed Materials Production Center, NLO, Inc. (hereinafter "NLO") and NL Industries, Inc. (hereinafter "NL Industries"). At this site, the Defendants have stored and disposed of hazardous wastes in pits, drums, and other devices in violation of state and federal hazardous waste laws and regulations, they have released radioactive materials and other hazardous substances into the air, water, and soil, and they have polluted surface water and groundwater with chemical and radioactive contaminants. This pollution, as well as threats of future pollution, presents a serious danger to the environment and natural resources of the State of Ohio and to the health and safety of its citizens. By this action, Plaintiff seeks the following relief against the entities creating and/or maintaining this dangerous situation: (1) reimbursement of the response costs the State has incurred and will incur to prevent, minimize, investigate, and/or eliminate the threat which the site poses to the public health and safety and the environment; (2) damages the State's natural resources have sustained and will sustain as a result of releases of hazardous substances from the site into the environment; (3) injunctive relief; (4) civil penalties; (5) declaratory relief; and (6) mandamus, which are sought pursuant to (a) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. Sections 9601 *et seq.* (b) the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. Sections 6901 *et seq.*, and the regulations promulgated thereunder; (c) the Clean Water Act ("CWA"), 33 U.S.C. Sections 1251 *et seq.*; (d) the Ohio Solid and Hazardous Waste Control Act, Ohio Revised Code Chapter 3734, and the rules promulgated thereunder; (e) the Ohio Water Pollution Control Act, Ohio Revised Code Chapter 6111, and the rules promul-

gated thereunder; (f) the Federal Declaratory Judgment Act, 28 U.S.C. Section 2201; and (g) 28 U.S.C. Section 1361 (mandamus to compel an officer or agency of the United States to perform duty); (h) Executive Order 12088; and (i) the Administrative Procedure Act, 5 U.S.C. Sections 551 *et seq.*

II. JURISDICTION

2. This Court has subject matter jurisdiction over the claims asserted herein under federal law pursuant to 42 U.S.C. Section 9613(b) (CERCLA), 42 U.S.C. Section 6972(a) (RCRA), 33 U.S.C. Section 1365(a) (CWA), 28 U.S.C. Section 1331 (federal question), 28 U.S.C. Section 1361 (mandamus), and 28 U.S.C. Section 2201 (declaratory judgment), and 28 U.S.C. Section 1337 (interstate commerce). The Court has pendent jurisdiction over the claims asserted under the laws of the State of Ohio.

3. By letters dated December 18, 1984 and February 20, 1986, Plaintiff notified the Administrator of the United States Environmental Protection Agency ("U.S. EPA") of the violations of RCRA described in this Complaint and stated the State's intent to file suit, as required by 42 U.S.C. Section 6972(C). The notices were also sent to DOE, NLO, NL Industries, and the Secretary of Energy. The Administrator, Secretary, DOE, NLO, and NL Industries received the December 18, 1984 notice more than sixty days prior to the filing of this lawsuit. The second notice, containing notice of violations of RCRA Subtitle C only, was received by the Defendants prior to institution of this lawsuit, as required by 42 U.S.C. Section 6972(c). Copies of these notices are attached hereto as Exhibits A and B and are fully incorporated herein by reference.

4. By letter dated December 18, 1984, Plaintiff notified the Administrator of U.S. EPA, DOE, NL Industries, and the Secretary of the violations of the CWA described in this Complaint, as required by 33 U.S.C. Section 1365(b).

The Administrator, DOE, NLO, NL Industries, and the Secretary received this notice more than sixty days prior to the filing of this lawsuit. A copy of this notice is attached hereto as Exhibit C and is fully incorporated herein by reference.

5. By a letter which was dated November 1, 1985 and which was received by its addressees more than sixty days ago, Plaintiff presented DOE, Herrington, NLO, and NL Industries with a claim of $206,066,792.49 for past and future costs of investigating and cleaning up the hazardous substances released by these Defendants at the Feed Materials Production Center. The letter also presented a claim of $205,000,000.00 to reimburse the State for damages to its natural resources damages. This letter is attached hereto as Exhibit D and is fully incorporated herein by reference.

III. VENUE

6. Venue is proper in this Court pursuant to 28 U.S.C. Section 1391, 42 U.S.C. Section 9613(b), 33 U.S.C. Section 1365(c), and 42 U.S.C. Section 6972(a).

IV. PARTIES

A. *The Plaintiff And The Plaintiff's Relator.*

7. The Plaintiff is the State of Ohio, which holds all natural resources, including the air, lands, and waters located within its political boundaries, in trust for the benefit of its citizens. As trustee of the natural resources located within its boundaries, Plaintiff owes a fiduciary duty to its citizens to protect and conserve its natural resources. As trustee of these natural resources, Plaintiff has been injured by the pollution of these natural resources with hazardous materials and water contaminants caused by the actions of the Defendants as described herein.

8. Plaintiff's relator is Anthony J. Celebrezze, Jr., Attorney General of Ohio. By virtue of his office, Attorney General Celebrezze is the chief legal officer of the State of Ohio. Plaintiff's relator institutes this action on behalf of the State of Ohio and at the request of the Director of Environmental Protection, State of Ohio, who is charged under Ohio law with the responsibility of protecting the air, lands, and waters located within Plaintiff's boundaries from pollution, degradation, and contamination.

B. *The Defendants.*

9. Defendant DOE is an executive department of the United States under 42 U.S.C. Section 7131. DOE owns the Feed Materials Production Center and is charged with responsibility for all operations at that site.

10. John S. Herrington is named as a Defendant in his official capacity as the Secretary of DOE and as the successor to Donald P. Hodel, the former Secretary of Energy. Under 42 U.S.C. Section 7131, he is responsible for, and has the authority necessary to administer, all affairs of DOE. Defendant Herrington's office is located at the DOE headquarters in Washington, D.C.

11. NLO is a corporation incorporated under the laws of the State of Ohio, with its principal office located in Cleveland, Ohio.

12. At all times pertinent to the allegations of this Complaint, NLO has been a wholly-owned subsidiary of NL Industries.

13. NL Industries is a corporation incorporated under the laws of the State of New Jersey, with its principal office located in New York City, New York and its principal Ohio office located in Cincinnati. NL Industries does business in several Ohio counties.

14. At all times pertinent to the allegations of this Complaint, NL Industries has dominated and controlled the activities of NLO. All of the actions of NLO complained of herein have been controlled by and/or subject

to the control of NL Industries. NL Industries knew and/or should have been aware of the actions of NLO complained of in this Complaint.

V. FACTS OF THE CASE

15. The Feed Materials Production Center ("FMPC") is a large-scale production facility which supplies uranium metal used in the fabrication of fuel cores for nuclear reactors owned by DOE. Located at 7400 Willey Road, only one mile from Fernald, Ohio, it includes approximately 1,050 acres of buildings or structures, installations, equipment, and grounds, mostly contained in Hamilton County, Ohio.

16. The FMPC is also located near the owns of Ross, New Baltimore, and Shendon. A population of more than 10,000 people resides within 5 miles of the FMPC, a population of more than 60,000 lives within 6 miles, and more than 227,000 persons live within 10 miles of the site.

17. The FMPC is situated in the Great Miami River Basin. Natural drainage from much of the site runs into Paddy's Run, a tributary of the Great Miami River. Both the Great Miami River and Paddy's Run are "navigable waters" and "waters of the state", as those terms are defined by 33 U.S.C. Section 1362(7) and Ohio Revised Code Section 6111.01(H), respectively.

18. At the FMPC, Defendants have "stored", "treated", and/or "disposed" of "hazardous waste", as those terms are defined by 42 U.S.C. Section 6903, 40 CFR 261.3, Ohio Revised Code Section 3734.01, Ohio Administrative Code ("O.A.C.") 3745-51-03 and O.A.C. 3745-50-10(A), including barium chloride salt bath sludge, a spent eutectic salt mixture, methylene chloride, perchlorethylene, 1,1,1-trichloroethane, 1,1,2-trichloroethane, benzene isomers, phthalates, and aryl sulfonamides.

19. Most of the hazardous wastes identified in paragraph 18 above have been and/or are being stored at the FMPC in drums or tanks. Current hazardous waste stor-

age facilities at the FMPC include at least one waste storage tank area and two drum storage areas.

20. Defendants have stored and/or disposed of hazardous waste by burying it at the FMPC. For example, Defendants have dumped barium chloride salt bath sludge into a pit known as Waste Pit 4, and subsequently covered it with soil and other waste materials. Liquid collected in Waste Pit 4 has been disposed in Waste Pit 5. Defendants have also disposed of hazardous wastes by allowing them to leak from drums into the environment.

21. Defendants' treatment of hazardous waste has included treatment of eutectic salt mixture at an installation known as the FMPC Pilot Plant Treatment Facilities.

22. As a result of Defendants' unlawful hazardous waste treatment, storage, and/or disposal practices, hazardous constituents have contaminated the groundwater at the FMPC.

23. Waste Pit 4, the Pilot Plant Treatment Facilities, the waste storage tank area, the drum storage areas, and all other land, appurtenances, structures, and improvements which, since 1979, have been or are being used for the treatment, storage, and/or disposal of hazardous waste are "facilities" or "hazardous waste facilities" as those terms are defined by 40 CFR 260.10, Ohio Revised Code Section 3734.01(N), and O.A.C. 3745-50-10(A)(22). Hereinafter they shall be referred to as the "FMPC hazardous waste facilities".

24. At all times pertinent to this lawsuit, DOE has been the "owner" and an "operator" of the FMPC hazardous waste facilities, as the terms "owner" and "operator" are defined by 40 CFR 260.10 and O.A.C. 3745-50-10(A)(55) and (54).

25. From 1979 until sometime in 1986, NLO and NL Industries were the "operators" of the FMPC hazardous waste facilities, as the term "operator" is defined by 40 CFR 260.10 and O.A.C. 3745-50-10(A)(54).

26. 42 U.S.C. Section 6961 provides that each department, agency, and instrumentality of the executive branch

of the federal government is subject to and must comply with all federal and state hazardous and solid waste requirements, both procedural and substantive, in the same manner and to the same extent as any other person subject to these requirements.

27. Defendants have stored, treated, and disposed of hazardous waste at the FMPC in blatant disregard for both federal and state hazardous waste requirements.

28. Large quantities of radioactive wastes have been dumped into at least six pits at the FMPC and otherwise stored and/or disposed at the site. Radioactive effluents and run-off have been discharged into Paddy's Run. Tons of radioactive uranium have been emitted into the air by smokestacks at the FMPC. Radioactive radon has been emitted into the air by two silos at the FMPC containing radium and other radioactive waste. A third silo also contains radioactive waste. Radiation-contaminated debris has been discarded or piled on the ground. These radioactive substances have contaminated and continue to contaminate the soil, air, surface water, and groundwater at and near the FMPC, including the water in several wells owned by neighbors of the FMPC.

29. On October 2, 1980, U.S. EPA lawfully issued to DOE National Pollutant Discharge Elimination System Permit Number OH 0009580 (hereinafter "NPDES Permit"). The NPDES Permit, attached hereto as Exhibit E and incorporated fully herein by reference, may be enforced by the State of Ohio pursuant to Ohio Revised Code Section 6111.04, 33 U.S.C. Sections 1323 and 1342, and 40 Code of Federal Regulations ("CFR") Part 123.

30. The NPDES Permit authorizes the Defendants to discharge process wastewater, stormwater runoff, and other wastes from pipes and sewers at the FMPC into the Great Miami River and Paddy's Run. These wastes are "pollutants", "industrial wastes", and "other wastes", as those terms are defined by 33 U.S.C. Section 1362(6), Ohio Revised Code Section 6111.01(C), and Ohio Revised Code Section 6111.01(D), respectively. The pipes are

"point sources", as that term is defined by 33 U.S.C. Section 1362(14). The NPDES Permit establishes effluent limitations restricting the amount of hexavalent chromium, copper, ammonia, nitrates, suspended solids, and other pollutants which may be lawfully discharged from the pipes into the Great Miami River and Paddy's Run.

31. The NPDES Permit (page 10) also establishes a schedule requiring the Defendants to install and operate facilities for biodenitrification and diversion of coal pile runoff (hereinatfer the "water pollution control facilities") to remove nitrates, ammonia, iron, and suspended solids from the effluent discharged by Defendants into the Great Miami River and Paddy's Run.

32. Pursuant to 33 U.S.C. Section 1323, each department, agency, or instrumentality of the executive branch of the federal government is subject to and must comply with all federal and state water pollution requirements to the same extent as any nongovernmental entity.

33. Defendants have violated the effluent limitations of their permit and have failed to construct the water pollution control facilities in accordance with the schedule of the permit, thereby violating both federal and state law.

34. Defendants DOE and Herrington continue to violate federal and state hazardous waste and water pollution laws and regulations at the FMPC. These violations will continue unless restrained by this Court and Plaintiff has no adequate remedy at law.

35. The general allegations contained in paragraphs 1 through 34 are applicable to each count of this Complaint, and are incorporated by reference into each as if fully restated therein.

A. *CERCLA Superfund Claims.*

COUNT ONE

36. The radioactive substances described in paragraph 28 above constitute "hazardous substances", as that term is defined by 42 U.S.C. Section 9601(14).

37. The hazardous wastes described in paragraphs 18 and 20 above are "hazardous substances", as that term is defined by 42 U.S.C. Section 9601(14).

38. The hazardous substances described in paragraphs 18, 20, and 28 above have been "released" and are threatened to be "released" into the "environment", as those terms are defined by 42 U.S.C. Section 9601(22) and (8) respectively.

39. The FMPC and its buildings, structures, installations, equipment, pipes, pits, landfills, and storage containers, including but not limited to large areas of land that have been contaminated with hazardous substances, are "facilities" as that term is defined by 42 U.S.C. Section 9601(9).

40. Defendant DOE is currently the "owner" and "operator" of the FMPC, as those terms are defined by 42 U.S.C. Section 9601(20), and was the "owner" and "operator" of the FMPC during the time the hazardous substances described in paragraphs 18, 20, 28, 36, 37, and 38 above were disposed at the FMPC.

41. Defendant Herrington is the current "owner" and/or "operator" of the FMPC, as those terms are defined by 42 U.S.C. Section 9601(20).

42. Defendants NLO and NL Industries were "operators" of the FMPC, as that term is defined by 42 U.S.C. Section 9601(20), during the time that the hazardous substances described in paragraphs 18, 20, 28, 36, 37, and 38 were disposed at the FMPC.

43. To prevent, minimize, and mitigate the damage to public health, welfare, and the environment which has resulted and which may result from the releases and threatened releases of hazardous substances from the FMPC, Plaintiff has undertaken a continuing program of "response" actions for the FMPC, as that term is defined by 42 U.S.C. Section 9601(25). Since 1984, Plaintiff has incurred response costs of more than $84,000.00 to monitor, assess, and evaluate the releases and threatened releases of hazardous substances from the FMPC,

including groundwater sampling and laboratory analysis, site inspections and investigations, modeling, and other activities. Plaintiff will continue to incur response costs in order to prevent further injury to public health, welfare and the environment from releases and threatened releases at and from the FMPC. The response actions and costs described in this paragraph are not inconsistent with the National Contingency Plan.

44. Pursuant to 42 U.S.C. Section 6907(g), each department, agency, or instrumentality of the executive branch of the federal government is subject to and must comply with CERCLA, including liability under 42 U.S.C. Section 9607, in the same manner and to the same extent as any nongovernmental entity.

45. Pursuant to 42 U.S.C. Section 9607(a) and (g), Defendants are jointly and severally liable for all costs of removal and remedial action which have been incurred and which will be incurred by Plaintiff, including reasonable attorneys fees for maintaining this action.

COUNT TWO

46. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 36 through 45 above as if fully set forth herein.

47. Pursuant to 42 U.S.C. Section 9607(g) and 9611 (h), the State of Ohio is the trustee for the "natural resources" on, over, under, and adjacent to the FMPC, as the term "natural resources" is defined by 42 U.S.C. Section 9601(16).

48. As a result of the releases of hazardous substances from the FMPC into the natural resources held in trust by and appertaining to the State of Ohio which are located on, over, under, and adjacent to the FMPC, including land, air, water, ground water, drinking water supplies, and other resources, these natural resources have been and continue to be injured, destroyed, and lost.

49. Pursuant to 42 U.S.C. Section 9607(a), Defendants are jointly and severally liable to the State of Ohio

for damages for the injury, destruction, and loss of natural resources on, over, under, and adjacent to the FMPC, including the reasonable costs of assessing such injury, destruction, and loss.

B. *Solid And Hazardous Waste Violations.*

COUNT THREE

50. 42 U.S.C. Section 6925(a) prohibits any person from using a facility for the treatment, storage, or disposal of hazardous waste except in accordance with a RCRA permit issued by the Administrator of U.S. EPA.

51. 42 U.S.C. Section 6925(e) and 40 CFR 270.70 (formerly numbered 40 CFR 122.23) provide that a person owning or operating such a facility on November 19, 1980 may continue to operate the facility during U.S. EPA review of his application for a RCRA permit only if the person has submitted the permit application in compliance with U.S. EPA regulations and has submitted hazardous waste notification(s) to the Administrator in compliance with 42 U.S.C. Section 6930. Such operation under RCRA Section 3005(e) and 40 CFR 270.70 is known as "interim status". 40 CFR 270.10 (formerly numbered 40 CFR 122.22) required Defendants to submit to U.S. EPA Part A of the permit application for the FMPC hazardous waste facilities by November 19, 1980.

52. Defendants have not timely submitted to U.S. EPA a Part A permit application complying with the requirements of 40 CFR Part 270 for the FMPC hazardous waste facilities existing on November 19, 1980. Because of Defendants' failures to comply with 42 U.S.C. Section 6925(e) and 40 CFR 270.70, the FMPC hazardous waste facilities existing on November 19, 1980 have not qualified for interim status under federal law.

53. Since November 19, 1980, 40 CFR 270.10(f) (formerly numbered 40 CFR 122.22(b)) has prohibited any person from beginning construction of land, appur-

tenances, structures, and improvements to be used for the treatment, storage, or disposal of hazardous waste, unless the person has first submitted Parts A and B of a permit application to U.S. EPA and received a RCRA permit.

54. Despite the prohibitions of 40 CFR 270.10(f) (40 CFR 122.22(b)), the Defendants, after November 19, 1980, constructed the Pilot Plant Treatment Facilities and other facilities for the treatment, storage, and/or disposal of hazardous waste at the FMPC without first applying for and receiving a RCRA permit for such construction.

55. Defendants continued to treat, store, and/or dispose of hazardous waste at the FMPC hazardous waste facilities which were existing on November 19, 1980 as well as the facilities which were constructed after that date, even though Defendants had failed to obtain a permit for these activities at any of the FMPC hazardous waste facilities. Defendants DOE and Herrington currently are continuing to treat, store, and/or dispose of hazardous waste at these facilities.

56. Since March 19, 1979, Ohio Revised Code Sections 3734.02(E) and 3734.05(B) have prohibited persons from operating a hazardous waste facility without first obtaining a hazardous waste facility installation and operation permit from the Ohio hazardous waste facility board.

57. Since March 19, 1979, Defendants have operated and continue to operate the FMPC hazardous waste facilities without obtaining a hazardous waste facility installation and operation permit.

58. Since March 19, 1979, Ohio Revised Code Section 3734.02(F) has prohibited any person from treating, storing, or disposing of hazardous waste at any premises other than the lawfully operated facilities listed in subsection (F).

59. Since March 19, 1979, Defendants have treated, stored, and/or disposed, and continue to treat, store, and

dispose, of hazardous waste at the FMPC hazardous waste facilities, which are not among the lawfully operated facilities listed in Ohio Revised Code Section 3734.02(F).

60. Defendants' treatment, storage, and/or disposal of hazardous waste at the FMPC hazardous waste facilities and failures to obtain a permit from U.S. EPA are violations of 42 U.S.C. Section 6925(a) and 40 CFR 270.10, for which each of Defendants is subject to injunctive relief and a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation pursuant to 42 U.S.C. Sections 6928 and 6972.

61. In a similar manner, Defendants' operation of, and treatment, storage, and disposal of hazardous waste at, the FMPC hazardous waste facilities are violations of Ohio Revised Code Sections 3734.02(E), 3734.02(F), 3734.05(B), and 3734.11, for which each of Defendants is subject to injunctive relief pursuant to Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation pursuant to Ohio Revised Code Section 3734.13(C).

COUNT FOUR

62. Since November 19, 1980, 40 CFR 264.31 and 40 CFR 265.31 have required owners and operators of a hazardous waste facility to maintain and operate the facility in a manner that minimizes the possibility of an unplanned release of hazardous waste or hazardous waste constituents to the air, soil, or surface water which could threaten human health or the environment. O.A.C. 3745-54-31 and O.A.C. 3745-65-31 [1] have contained the same requirements since April 15, 1981.

63. Since the effective dates of these rules and regulations, Defendants have failed and continue to fail to maintain and operate the FMPC hazardous waste facilities, including but not limited to drums of hazardous

[1] Formerly numbered O.A.C. 3745-55-31.

waste and Waste Pit 4, in a manner that minimizes the unplanned release of hazardous waste and/or hazardous waste constituents to the soil and surface water which could threaten human health and the environment.

64. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.31, 40 CFR 265.31, O.A.C. 3745-54-31, and/or O.A.C. 3745-65-31, as well as Ohio Revised Code Section 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Section 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT FIVE

65. Since November 19, 1980, 40 CFR 264.56(b) and 40 CFR 265.56(b) have required the owners and operators of a hazardous waste facility, through their emergency coordinator, to immediately identify the character, exact source, amount, and areal extent of any hazardous waste or hazardous waste constituents which have been released from the facility. O.A.C. 3745-54-56(B) and O.A.C. 3745-65-56(B)[2] have contained the same requirements since April 15, 1981.

66. From an unknown date until the present, Defendants have failed and continue to fail to immediately identify the character, exact source, amount, and areal extent of hazardous waste and hazardous waste constituents that have been released from the FMPC hazardous waste facilities, including but not limited to Waste Pit 4.

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[2] Formerly numbered O.A.C. 3745-55-56(B).

67. Since November 19, 1980, 40 CFR 264.56(c) and 40 CFR 265.56(c) have required the owners and operators of a hazardous waste facility, through their emergency coordinator, to assess possible hazards to human health or the environment that may result from releases of hazardous waste or hazardous waste constituents from the facility. O.A.C. 3745-54-56(C) and O.A.C. 3745-65-56(C)[3] have contained the same requirement since April 15, 1981.

68. From an unknown date until the present, Defendants have failed and continue to fail to assess possible hazards to human health or the environment that may result from releases of hazardous waste or hazardous waste constituents from the FMPC hazardous waste facilities, including but not limited to leaking drums and Waste Pit 4.

69. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.56, 40 CFR 265.56, O.A.C. 3745-54-56, and/or O.A.C. 3745-65-56, as well as Ohio Revised Code Section 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT SIX

70. Since November 19, 1980, 40 CFR 264.56(j) and 40 CFR 265.56(j) have required the owners and operators of a hazardous waste facility to submit to U.S. EPA written reports within fifteen days providing the informa-

[3] Formerly numbered O.A.C. 3745-55-56(C).

tion about releases described in that subsection. Since April 15, 1981, O.A.C. 3745-54-56(j) and O.A.C. 3745-65-56(j)[4] have required the same written reports to be submitted to Ohio EPA.

71. From an unknown date until the present, Defendants have failed and continue to fail to submit to U.S. EPA and Ohio EPA written reports containing the information required by these rules and about releases at the FMPC regulating hazardous waste facilities. These releases include but are not limited to leakage of hazardous waste from drums which have in the past been stored at the FMPC and releases of hazardous waste from Waste Pit 4, which continues to occur.

72. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.56(j), 40 CFR 265.56(j), O.A.C. 3745-54-56(j), and/or O.A.C. 3745-65-56(j), as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Section 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT SEVEN

73. 40 CFR Part 265, Subpart F requires that, by November 19, 1981, the owners and operators of any surface impoundment or landfill which is used to manage hazardous waste must implement a groundwater monitoring program in compliance with 40 CFR 265, Subpart F. 40 CFR Part 264, Subpart F requires that, by January 26, 1983, the owners and operators of any surface

[4] Formerly numbered O.A.C. 3745-55-56(j).

impoundment or landfill used to treat, store, or dispose of hazardous waste must implement a groundwater monitoring program in compliance with 40 CFR 264, Subpart F. The same requirements have been mandated by O.A.C. 3745-54-90 through 99 since August 30, 1984 and have been mandated by O.A.C. 3745-65-90 through 94[5] since November 19, 1981.

74. Waste Pit 4 at the FMPC is either a "landfill" or a "surface impoundment" as those terms are defined by 40 CFR 260.10 and O.A.C. 3745-50-10(A)(42) and (78).

75. Defendants have failed and continue to fail to implement a groundwater monitoring system for Waste Pit 4 which complies with the requirements of 40 CFR 265 Subpart F, 40 CFR 264 Subpart F, O.A.C. 3745-65-90 through 94, and/or O.A.C. 3745-54-90 through 99.

76. Defendants' failure to comply with the groundwater monitoring requirements described in this Count of the Complaint are violations of 40 CFR 265 Subpart F, 40 CFR 264 Subpart F, O.A.C. 3745-65-90 through 94, and/or O.A.C. 3745-54-90 through 99, as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each of Defendants is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.12(C).

COUNT EIGHT

77. 40 CFR 264.112 requires that the owners and operators of a hazardous waste facility submit to U.S. EPA, by July 13, 1981, a written closure plan for the facility meeting the requirements of the regulation. 40

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[5] Formerly numbered O.A.C. 3745-55-90 through 94.

CFR 265.112 requires submission of this closure plan by May 19, 1981. In a similar manner O.A.C. 3745-55-12 [6], and O.A.C. 3745-66-12 require submission of the closure plan by April 15, 1981 and January 7, 1983, respectively.

78. Defendants failed to submit a closure plan for any of the FMPC hazardous waste facilities until approximately July of 1984, when it submitted a closure plan for some of these facilities. Defendants still have not submitted a closure plan for Waste Pit 4 that complies with the requirements of 40 CFR 264.112, 40 CFR 265.112, O.A.C. 3745-55-12, and/or O.A.C. 3745-66-12.

79. Since July 13, 1981, 40 CFR 264.113 and 40 CFR 265.113 have required the owners and operators of a hazardous waste faciilty to treat, remove, or dispose of the hazardous waste contained in the facility within 90 days after receiving the final volume of hazardous waste at the facility. These treatment, removal and disposal actions must be performed in accordance with an approved closure plan. All other closure activities must be completed in accordance with an approved closure plan within 180 days after receipt of the final volume of hazardous wastes, or in the case of 40 CFR 265.113, within 180 days after approval of the closure plan if that is later. These same requirements have been mandated by O.A.C. 3745-55-13 [7] and O.A.C. 3745-66-13 since January 7, 1983.

80. Even though Defendants deposited the final volume of hazardous wastes into Waste Pit 4 in approximately April of 1983, Defendants have not yet closed Waste Pit 4 in accordance with an approved closure plan.

81. Since July 13, 1981, 40 CFR 264.111 and 40 CFR 265.111 have required the owners and operators of a hazardous waste facility to close the facility in a manner that, to the extent necessary to prevent threats to human health and the environment, controls, minimizes, or elim-

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[6] Formerly numbered O.A.C. 3745-56-03.

[7] Formerly numbered O.A.C. 3745-56-04.

inates post-closure escape of hazardous waste, hazardous waste constituents, leachate, contaminated rainfall, or waste decomposition products to the ground waters, surface waters, or atmosphere. The same requirements have been contained in O.A.C. 3745-55-11[8] since April 15, 1981 and in O.A.C. 3745-66-11 since January 7, 1983.

82. Even though hazardous waste has not been placed in Waste Pit 4 since approximately April of 1983, Defendants have not closed Waste Pit 4 in a manner that complies with 40 CFR 264.111, 40 CFR 265.111, O.A.C. 3745-55-11, or O.A.C. 3745-66-11.

83. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.111, 40 CFR 264.112, 40 CFR 264.113, 40 CFR 265.111, 40 CFR 265.112, 40 CFR 265.113, O.A.C. 3745-55-11, O.A.C. 3745-55-12, O.A.C. 3745-55-13, and/or O.A.C. 3745-66-11, O.A.C. 3745-66-12, and O.A.C. 3745-66-13, as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT NINE

84. Since July 13, 1981, 40 CFR 264.173 has prohibited the owners and operators of a hazardous waste facility from handling and storing a container of hazardous waste in a manner which may rupture the container or cause it to leak. This conduct has been prohibited by 40 CFR 265.173 since November 19, 1980,

[8] Formerly numbered O.A.C. 3745-56-02.

by O.A.C. 3745-55-73 [9] since April 15, 1981 and by O.A.C. 3745-66-73 since January 7, 1983.

85. During an unknown period of time ending in approximately April of 1984, Defendants handled and stored containers of hazardous waste in a manner that caused them to leak.

86. Since July 13, 1981, 40 CFR 264.171 has required the owners and operators of a hazardous waste facility to transfer hazardous waste from a leaking container or a container not in good condition to a container which is in good condition or to manage the waste in some other way that complies with the hazardous waste facility standards. This same requirement has been mandated by 40 CFR 265.171 since November 19, 1980, by O.A.C. 3745-55-71 [10] since April 15, 1981, and by O.A.C. 3745-66-71 since January 7, 1983.

87. During an unknown time period ending in approximately April of 1984, Defendants failed to transfer hazardous waste from containers at the FMPC which were leaking or not in good condition to containers which were in good condition, or to manage the waste in some other way that complied with the hazardous waste facility standards.

88. Since July 13, 1981, 40 CFR 264.174 has required owners and operators of a hazardous waste facility to at least weekly inspect container storage areas, looking for leaking and deteriorated containers. This same requirement has been mandated by 40 CFR 265.174 since November 19, 1980, by O.A.C. 3745-55-74 [11] since April 15, 1981, and by O.A.C. 3745-66-74 since January 7, 1983.

89. During an unknown period of time ending in approximately April of 1984, Defendants failed to at least weekly inspect the container storage area at the FMPC.

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[9] Formerly numbered O.A.C. 3745-56-53.

[10] Formerly numbered O.A.C. 3745-56-51.

[11] Formerly numbered O.A.C. 3745-56-54.

90. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.171, 40 CFR 264.173, 40 CFR 264.174, 40 CFR 265.171, 40 CFR 265.173, 40 CFR 265.174, O.A.C. 3745-55-11, O.A.C. 3745-55-73, O.A.C. 3745-55-74, and/or O.A.C. 3745-66-71, O.A.C. 3745-66-73, and O.A.C. 3745-66-74, as well as Ohio Revised Code Section 3734-11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928 (g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT TEN

91. Since November 19, 1980, 40 CFR 264.15(b) and 40 CFR 265.15(b) have required the owners and operators of a hazardous waste facility to develop and follow a written inspection schedule to prevent, detect, and respond to environmental and human health hazards and to keep this schedule at the facility. O.A.C. 3745-54-15(B) and O.A.C. 3745-65-15(B)[12] have contained the same requirements since April 15, 1981.

92. From the effective dates of these rules and regulations until approximately July of 1984, Defendants failed to develop and follow a written inspection schedule and to keep this schedule at the FMPC.

93. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.15(b), 40 CFR 265.15(b), O.A.C. 3745-54-15(B), and/or O.A.C. 3745-65-15(B), as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive

[12] Formerly numbered O.A.C. 3745-55-15(B).

relief pursuant to 42 U.S.C. Sections 6928(a) and 6972 (a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928 (g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT ELEVEN

94. Since November 19, 1980, 40 CFR 264.35 and 40 CFR 265.35 have required the owners and operators of a hazardous waste facility to maintain aisle space at the facility adequate to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation during an emergency. O.A.C. 3745-54-35 and O.A.C. 3745-65-35 [13] have contained the same requirements since April 15, 1981.

95. For an unknown period of time ending in approximately April of 1984, Defendants failed to maintain at the FMPC hazardous waste facilities the aisle space required by these rules and regulations.

96. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.35, 40 CFR 265.35, O.A.C. 3745-54-35, and/or O.A.C. 3745-65-35, as well as Ohio Revised Code Section 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

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[13] Formerly numbered O.A.C. 3745-55-35.

COUNT TWELVE

97. Since November 19, 1980, 40 CFR 264.51(a) and 40 CFR 265.51(a) have required the owners and operators of a hazardous waste facility to have a contingency plan for the facility designed to minimize hazards to human health or the environment from fires, explosions, or releases of hazardous waste to the air, soil, or surface water. O.A.C. 3745-54-51(A) and O.A.C. 3745-65-51 (A)[14] have contained the same requirements since April 15, 1981. ("Contingency plan" is defined by 40 CFR 260.10 and O.A.C. 3745-50-10(A)(13)).

98. From the effective dates of these rules and regulations until approximately July of 1984, Defendants did not have a contingency plan for the FMPC hazardous waste facilities.

99. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.51(a), 40 CFR 265.51(a), O.A.C. 3745-54-51(A), and/or O.A.C. 3745-65-51(A), as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT THIRTEEN

100. Since November 19, 1980, 40 CFR 264.73 and 40 CFR 265.73 have required the owners and operators of a hazardous waste facility to keep a written operating record at the facility containing the information about hazardous waste required by those regulations. O.A.C.

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[14] Formerly numbered O.A.C. 3745-55-51(A).

3745-54-73 and O.A.C. 3745-65-73 [15] have contained the same requirements since April 15, 1981.

101. From the effective dates of these rules and regulations until a date unknown to Plaintiff, Defendants failed to keep at the FMPC hazardous waste facilities an operating record containing the information required by these rules and regulations.

102. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.73, 40 CFR 265.73, O.A.C. 3745-54-73, and/or O.A.C. 3745-65-73, as well as Ohio Revised Code Sections 3745-05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulation pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT FOURTEEN

103. Since November 19, 1980, 40 CFR 264.16(a), (b), and (c) have required the owners and operators of a hazardous waste facility to implement a program to teach personnel at the facility to perform their hazardous waste management duties and to respond to emergencies. O.A.C. 3745-54-16(A), (B), and (C) and O.A.C. 3745-65-16(A), (B), and (C) [16] have contained the same requirements since April 15, 1981.

104. Since November 19, 1980, 40 CFR 264.16(d) and (e) have required the owners and operators of a hazardous waste facility to maintain and keep personnel job description and training documents and records at

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[15] Formerly numbered O.A.C. 3745-55-73.

[16] Formerly numbered O.A.C. 3745-55-16.

the facility. O.A.C. 3745-54-16(D) and (E) and O.A.C. 3745-65-16(D) and (E) have contained the same requirements since April 15, 1981.

105. From the effective dates of these rules and regulations until a date unknown to Plaintiff, Defendants failed to implement the training program and maintain the records for the FMPC hazardous waste facilities required by these rules and regulations.

106. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.16, 40 CFR 265.16, O.A.C. 3745-54-16, and/or O.A.C. 3745-65-16, as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT FIFTEEN

107. Since November 19, 1980, 40 CFR 264.13 and 40 CFR 265.13 have required the owners and operators of a hazardous waste facility to develop and follow a written waste analysis plan and keep the plan at the facility. O.A.C. 3745-54-13(B) and O.A.C. 3745-65-13(B)[17] have contained the same requirement since April 15, 1981.

108. From the effective dates of these rules and regulations until approximately July of 1984, Defendants failed to develop and follow a written waste analysis plan and failed to keep such a plan at the FMPC hazardous waste facilities.

109. Defendants' failures to perform the duties described in this Count of the Complaint are violations of

[17] Formerly numbered O.A.C. 3745-55-13(B).

40 CFR 264.13(B), 40 CFR 265.13(B), O.A.C. 3745-54-13(B), and/or O.A.C. 3745-65-13(B), as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,00.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT SIXTEEN

110. Pursuant to 42 U.S.C. Section 6964, DOE and Herrington are required to insure that any solid waste management and disposal on their property, including waste management and disposal by its contractors, comply with the guidelines and purposes of RCRA.

111. Since assuming jurisdiction over the FMPC around 1978, DOE and Herrington have failed and continue to fail to insure that solid waste management and disposal at the FMPC, including the solid waste management and disposal by their contractors, complies with the guidelines and purposes of RCRA.

112. The failures of these Defendants to perform the duties described in this Count are violations of 42 U.S.C. Section 6964, for which these Defendants are subject to injunctive relief pursuant to 42 U.S.C. Section 6928(a) and 6972(a). In the alternative, compliance with 42 U.S.C. Section 6964 is a nondiscretionary duty owed to Plaintiff by DOE and Herrington, and failure to perform this duty is subject to mandamus pursuant to 28 U.S.C. Section 1361.

C. *Water Pollution Violations.*

COUNT SEVENTEEN

113. Defendants have discharged pollutants from the point sources at the FMPC in excess of the effluent limitations in the NPDES Permit. Defendants DOE and Herrington continue to discharge pollutants in excess of these limitations.

114. The effluent limitations violated by Defendants and the dates of violations include but are not limited to the following:

hexavalent chromium (outfalls 001B & 001C)
daily maximum violations—

October 30, 1983
March 23, 1984
March 26, 1984
April 3, 1984
May 17, 1984
May 24, 1984
June 1, 1984
December 19, 1984
July 10, 1985
August 22, 1985
October 24, 1985
November 12, 1985

daily average violations—

October, 1983
December, 1983
March, 1984
May, 1984
June, 1984
July, 1984
October, 1984
December, 1984
January, 1985
February, 1985

July, 1985
August, 1985
October, 1985
November, 1985

total chromium (outfalls 001B & 001C)
daily maximum violation—

August 2, 1984

daily average violation—

August, 1984

copper (outfalls 001B & 001C)
daily maximum violations—

March 23, 1984
July 9, 1984
November 20, 1984
November 12, 1985

daily average violations—

February, 1984
March, 1984
April, 1984
May, 1984
July, 1984
November, 1984
December, 1984
November, 1985

iron (outfalls 001B & 001C)
daily maximum violations—

October 24, 1985
December 3, 1985

daily average violations—

April, 1984
October, 1985
December, 1985

ammonia (outfall 001)
daily maximum violations—

July 6, 1984
July 9, 1984
July 17, 1984
July 25, 1984
August 2, 1984
August 9, 1984
August 13, 1984
August 21, 1984
August 30, 1984

oil and grease
daily maximum violations—

December 22, 1984 (outfall 002)
February 11, 1985 (outfall 001)

suspended solids (outfall 002)
daily maximum violations—

May 15, 1985
November 11, 1985

daily average violation—

October, 1985

suspended solids (outfalls 001B & 001C)
daily maximum violations—

October 22, 1983
April 27, 1984
January 23, 1985
March 18, 1985
November 12, 1985

daily average violations—

April, 1984
July, 1984
November, 1984
January, 1985

March, 1985
July, 1985
November, 1985

115. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT EIGHTEEN

116. Defendants have violated the terms of the NPDES Permit by their failure to submit preliminary design plans for the water pollution control facilities by June 1, 1982.

117. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT NINETEEN

118. Defendants have violated the terms of the NPDES Permit by their failure to submit final plans and specifications for the water pollution control facilities by October 1, 1982.

119. Defendants' failures to perform the duties described in this Count of the Complaint constitute viola-

tions of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY

120. Defendants have violated the terms of the NPDES Permit by their failure to begin construction of the water pollution control facilities by January 1, 1983.

121. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY-ONE

122. Defendants have violated the terms of the NPDES Permit by their failure to submit a progress report to the Ohio Environmental Protection Agency ("Ohio EPA") by September 30, 1983 describing their progress in designing and installing the water pollution control facilities.

123. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.09 and is subject to a civil penalty of up to ten

thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY-TWO

124. Defendants have violated and continue to violate the terms of the NPDES Permit by their failure to complete construction of the water pollution control facilities by April 1, 1984.

125. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY-THREE

126. Defendants have violated and continue to violate the terms of the NPDES Permit by their failure to have the water pollution control facilities operational by June 30, 1984.

127. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY-FOUR

128. Defendants have violated the terms of the NPDES Permit by their failure to submit to U.S. EPA or the Ohio Environmental Protection Agency ("Ohio EPA") written notice of noncompliance within fourteen (14) days after their failures to perform the duties described in Counts Twenty through Twenty-Five above.

129. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY-FIVE

130. During a time period presently unknown to Plaintiff, Defendants have placed or caused to be placed, and continue to place or cause to be placed, industrial wastes and/or other wastes, as defined in Revised Code Section 6111.01(C) and (D), in locations where such wastes have caused pollution of the "waters of the State", as defined in Ohio Revised Code Section 6111.01(H), despite the fact that Defendants have no permit to do so. This pollution includes but is not limited to the contamination of groundwater by hazardous constituents, chemical pollutants, and nitrates from the FMPC.

131. The acts described in this Count of the Complaint constitute violations of Revised Code Sections 6111.04 and 6111.07, for which each Defendant is subject to injunctive relief pursuant to Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to Revised Code Section 6111.09.

COUNT TWENTY-SIX

132. O.A.C. 3745-31-02 prohibits a person from causing, permitting, or allowing the installation or modification of a "disposal system", as that term is defined by Ohio Revised Code Section 6111.01(G), without first obtaining a permit to install from the Director of Environmental Protection.

133. Defendants have begun the installation and/or modification of a disposal system at the FMPC without first obtaining a permit to install from the Director. DOE and Herrington continue this installation and/or modification without a permit to install.

134. The conduct of the Defendants described in this Count of the Complaint constitutes violations of O.A.C. 3745-31-02 and Ohio Revised Code Section 6111 07(A), for which each Defendant is subject to injunctive relief pursuant to Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to Ohio Revised Code Section 6111.09.

D. *Violations of Executive Order 12088*

COUNT TWENTY-SEVEN

135. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 36 through 134 above as if fully set forth herein.

136. Executive Order 12088, *reprinted at* 42 U.S.C.A. Section 4321, requires each executive agency and each chief administrative officer of an executive agency to ensure that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to federal facilities and activities under control of the agency. Each agency and chief administrative officer is responsible for compliance with all applicable pollution control standards, including the Federal Water Pollution Control Act, 33 U.S.C. Sections 1251 et seq., the Solid Waste Disposal Act, 42 U.S.C. Sections 6901

et seq., and all other substantive, procedural, and other requirements that would apply to a private person.

137. Section 1-2 of Executive Order 12088 requires executive agencies and chief administrative officers to cooperate with state agencies in the prevention, control, and abatement of environmental pollution. This section also requires agencies and chief administrative officers to consult with state agencies concerning the best techniques and methods available for the prevention, control, and abatement of environmental pollution.

138. Section 1-5 of Executive Order 12088 requires each executive agency and chief administrative officer to ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget.

139. Section 1-6 of Executive Order 12088 requires that, whenever a state agency notifies an executive agency that it is in violation of an applicable pollution control standard, the executive agency shall consult with the notifying agency and provide for its approval a plan and implementation schedule to achieve and maintain compliance as soon as practicable.

140. The conduct of Defendants DOE and Herrington described in this Complaint constitutes violations of "applicable pollution control standards", as that term is defined in Executive Order 12088. Defendants DOE and Herrington have failed and continue to fail to ensure the compliance of the FMPC with all applicable pollution control standards and have failed and continue to fail to ensure that all necessary actions are taken at the FMPC for the prevention, control, and abatement of environmental pollution.

141. With some exceptions, Defendants DOE and Herrington have failed and continued to fail to cooperate with the Ohio Environmental Protection Agency ("Ohio EPA") in the prevention, control, and abatement of environmental pollution and to consult with Ohio EPA concerning the best techniques and methods available for

the prevention, control, and abatement of environmental pollution.

142. Defendants DOE and Herrington have failed to ensure that sufficient funds for compliance with applicable pollution control standards are requested in the DOE budgets.

143. After being notified by Ohio EPA that it was in violation of applicable pollution control standards, Defendants DOE and Herrington have failed and continue to fail to promptly consult with Ohio EPA and/or to provide for its approval a plan and implementation schedule to achieve and maintain compliance with applicable pollution control standards as soon as practicable.

144. The conduct of Defendants described in this count of the Complaint constitutes violations of Executive Order 12088, for which Defendants are subject to injunctive and declaratory relief. Plaintiff has no remedy at law for these violations.

145. The actions and failures of Defendants to act described in this count of the Complaint are "agency actions", as defined by 5 U.S.C. Section 551(13), which adversely affect and aggrieve and inflict legal wrong on Plaintiff. These agency actions are reviewable pursuant to 5 U.S.C. Sections 702 and/or 704 and are subject to declaratory and injunctive relief pursuant to 5 U.S.C. Sections 703 and/or 706.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Pursuant to 42 U.S.C. Section 9607, order Defendants to recompense Plaintiff for response costs which have been incurred and, which will be incurred by Plaintiff to address releases and threatened releases of hazardous substances at and from the FMPC;

B. Issue a declaratory judgment pursuant to 28 U.S.C. Section 2201 declaring that Defendants are jointly and

severally liable for all response costs not inconsistent with the National Contingency Plan incurred by the State to address the releases and threatened releases at and from the FMPC;

C. Pursuant to 42 U.S.C. Section 9607, order Defendants to pay damages to the State of Ohio for the injury to, destruction of, and loss of its natural resources, resulting from releases of hazardous substances at and from the FMPC, including the reasonable costs of assessing such injury, destruction, or loss;

D. Issue a declaratory judgment pursuant to 28 U.S.C. Section 2201 declaring that the actions and failures of Defendants described in Counts Three through Sixteen above are violations of RCRA, Ohio Revised Code Chapter 3734, and the federal and state rules and regulations promulgated pursuant to these statutes;

E. Issue an injunction pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 prohibiting Defendants from violating, and ordering Defendants to comply with, RCRA, Ohio Revised Code Chapter 3734, and the rules and regulations listed in Counts Three through Sixteen above:

F. Issue an injunction pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 prohibiting Defendants from treating, storing, and disposing of hazardous waste unless they have received a Part B Permit from U.S. EPA and a hazardous waste facility installation and operation permit from the Ohio hazardous waste facility board authorizing such treatment, storage, or disposal;

G. Issue a mandatory injunction pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 ordering Defendants to

(1) analyze the soil, surface water, and ground water at the FMPC and at certain locations outside of the FMPC for hazardous waste and hazardous waste constituents, in such a manner and at such locations as approved in writing by the Ohio EPA;

(2) formulate, and submit to Ohio EPA for approval, plans for the removal, treatment, and/or disposal of all hazardous waste at the FMPC and soil, surface water, and ground water at or outside the FMPC that has been contaminated with hazardous waste and hazardous waste constituents from the FMPC; and

(3) remove, treat and/or dispose of the hazardous waste and contaminated soil, surface water, and ground water in accordance with the plan approved by Ohio EPA;

H. Order each of Defendants, pursuant to 42 U.S.C. Sections 6928(g) and 6972(a), to pay a civil penalty of twenty-five thousand dollars ($25,000.00) for each day of each violation of RCRA and the federal regulations promulgated thereunder, and order each of Defendants, pursuant to Ohio Revised Code Section 3734.13(C), to pay into the Ohio hazardous waste facility management special account a civil penalty of ten thousand dollars ($10,000.00) for each day of each violation of Ohio Revised Code Chapter 3734 and the state rules promulgated thereunder;

I. Issue an injunction pursuant to 42 U.S.C. Section 6928(a) and 6972(a) prohibiting Defendants DOE and Herrington from violating, and ordering these Defendants to comply with, 42 U.S.C. Section 6964; in the alternative, issue a writ of mandamus requiring these Defendants to comply with 42 U.S.C. Section 6964;

J. Issue a declaratory judgment pursuant to 28 U.S.C. Section 2201 declaring that the actions and failures of Defendants described in Counts Seventeen through Twenty-Six above are violations of the CWA, Ohio Revised Code Chapter 6111, and O.A.C. 3745-31-02;

K. Issue an injunction pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 prohibiting Defendants from violating, and ordering Defendants to comply with, the CWA, Ohio Revised Code Chapter 6111, and O.A.C. 3745-31-02;

L. Order each of Defendants, pursuant to 33 U.S.C. Section 1319(d) and 1365(a), to pay a civil penalty of ten thousand dollars ($10,000.00) per day of each violation of the CWA, and order each of Defendants, pursuant to Ohio Revised Code Section 6111.09, to pay into the treasury a civil penalty for each violation of Ohio Revised Code Chapter 6111 and O.A.C. 3745-31-02 in the amount of ten thousand dollars ($10,000.00) per day of each violation;

M. Issue a declaratory judgment pursuant to 28 U.S.C. Section 2201 and/or 5 U.S.C. Section 703 declaring that the actions of Defendants DOE and Herrington described in this Complaint are violations of Executive Order 12088 and issue an injunction prohibiting these Defendants from violating Executive Order 12088;

N. Pursuant to Executive Order 12088 and/or 5 U.S.C. Section 706, compel Defendants DOE and Herrington to perform the duties required by that Executive Order, including but not limited to: (1) complying with federal and state hazardous waste and water pollution laws and regulations; (2) taking all actions necessary to abate, control, and prevent environmental pollution at the FMPC; (3) cooperating and consulting with Ohio EPA in the abatement, control, and prevention of environmental pollution; (4) ensuring that sufficient funds for compliance with applicable pollution control standards are requested, and (5) submitting a plan and implementation schedule for compliance to Ohio EPA for its approval; in the alternative, issue a writ of mandamus pursuant to 28 U.S.C. Section 1361 compelling these duties;

O. Award Plaintiff its costs, disbursements, and reasonable attorneys fees and expert witness fees;

P. Retain jurisdiction of this suit for the purpose of making any order or decree which it may deem necessary at any time to carry out its judgment; and

Q. Grant such other relief as it may deem necessary and just.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO

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Of Counsel

[Exhibits to Complaint not reproduced]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-86-0217
Judge Spiegel

STATE OF OHIO, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
DEFENDANTS

ANSWER OF FEDERAL DEFENDANTS

[Filed Apr. 29, 1988]

1. The averments of Paragraph 1 of the Complaint state only legal conclusions as to which no answer is required.

2. The averments of Paragraph 2 of the Complaint state only legal conclusions as to which no answer is required.

3. Answering the averments of Paragraph 3 of the Complaint, U.S. Department of Energy ("DOE") and Secretary of Energy John S. Herrington ("Federal Defendants"), admit that the Secretary of Energy received a copy of Exhibit A to the Complaint more than sixty days prior to March 11, 1986, and a copy of Exhibit B to the Complaint prior to that date. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 3 concerning the EPA Administrator, NLO or NL Industries. To the extent that the averments of Paragraph 3 merely characterize or summarize Exhibits A and B, no answer is required since those documents

are the best evidence of their respective contents. Except as otherwise responded to herein, the averments of Paragraph 3 state only legal conclusions as to which no answer is required.

4. Answering the averments of Paragraph 4 of the Complaint, Federal Defendants admit that the Secretary of Energy received a copy of Exhibit C more than sixty days prior to March 11, 1986. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 4 concerning the EPA Administrator, NLO or NL Industries. To the extent that the averments of Paragraph 4 merely characterize or summarize Exhibit C, no answer is required since that document is the best evidence of its contents. Except as otherwise responded to herein, the averments of Paragraph 4 state only legal conclusions as to which no answer is required.

5. Answering the averments of Paragraph 5 of the Complaint, Federal Defendants admit that the Secretary of Energy received a copy of Exhibit D more than sixty days prior to March 11, 1986. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 5 concerning the EPA Administrator, NLO or NL Industries. Except as responded to herein the averments of Paragraph 5 merely characterize or summarize Exhibit D and, accordingly, no answer is required since that document is the best evidence of its contents.

6. The averments of Paragraph 6 of the Complaint state only legal conclusions as to which no answer is required.

7. Answering the averments of Paragraph 7 of the Complaint, Federal Defendants admit that the State of Ohio is the Plaintiff in this action. Federal Defendants aver that DOE is the natural resources trustee for all property under its control. Except as specifically admitted herein the averments of Paragraph 7 state only legal conclusions as to which no answer is required.

8. Answering the averments of Paragraph 8 of the Complaint, Federal Defendants admit that Anthony J. Celebreeze, Jr., is the Attorney General of Ohio and, by virtue of that office, is the Chief legal officer of the State of Ohio. Federal Defendants are without information sufficient to form a belief as to the truth or falsity of the averment of Paragraph 8 that this action is instituted at the request of the Director of Environmental Protection, State of Ohio. Except as responded to herein, the averments of Paragraph 8 state only legal conclusions as to which no answer is required.

9. Answering the averments of Paragraph 9 of the Complaint, Federal Defendants admit that Defendant DOE is an executive department of the United States of America, and that Defendant DOE has specific statutory responsibility over the Feed Materials Production Center (hereinafter the "FMPC") on behalf of the United States of America, which is the owner of the facility. Except as specifically admitted herein, the averments of Paragraph 9 state only legal conclusions as to which no answer is required.

10. Federal Defendants admit that the averments of the first and third sentences of Paragraph 10 of the Complaint. The averments of the second sentence of Paragraph 10 state only legal conclusions as to which no answer is required.

11. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 11 of the Complaint.

12. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 12 of the Complaint.

13. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 13 of the Complaint.

14. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 14 of the Complaint.

15. Federal Defendants admit the averments of Paragraph 15 of the Complaint.

16. Federal Defendants admit the averments of the first sentence of Paragraph 16 of the Complaint. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of the second sentence of Paragraph 16 of the Complaint.

17. Federal Defendants admit the averments of the first sentence of Paragraph 17 of the Complaint. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of the second sentence of Paragraph 17 of the Complaint. The third sentence of Paragraph 17 states only legal conclusions as to which no answer is required.

18. Federal Defendants admit that certain hazardous materials, including those set forth in Paragraph 18, have been placed at various times at the FMPC. The remaining averments of Paragraph 18 of the Complaint state only legal conclusions as to which no answer is required.

19. As to the first sentence of Paragraph 19, the Federal Defendants admit that hazardous materials have been placed at the FMPC in drums or tanks. As to the second sentence of Paragraph 19, Federal Defendants admit that the FMPC currently has at least one storage tank area and two drum storage areas. Except as specifically admitted herein, the remaining averments of Paragraph 19 of the Complaint state only legal conclusions as to which no answer is required.

20. As to the first sentence of Paragraph 20, the Federal Defendants admit that hazardous materials have been placed in one or more pits at the FMPC and covered over with soil. As to the second sentence of Paragraph 20, the federal defendants admit that barium chloride salt bath sludge has been placed into Pit 4 and

covered over with soil. Except as specifically admitted herein, the averments of the second sentence of Paragraph 20 are denied. As to the third sentence of Paragraph 20, Federal Defendants aver that rain water collecting in Pit 4 has been pumped away to pit 5. The averments of the fourth sentence of Paragraph 20 are denied. Except as specifically admitted herein the averments of paragraph 20 are denied.

21. As to the averments of Paragraph 21 of the Complaint, Federal Defendants admit that eutectic salt mixture has been processed at the FMPC Pilot Plant. Except as specifically admitted herein, the remaining averments of Paragraph 21 of the Complaint state only legal conclusions as to which no answer is required.

22. Until completion of the Remedial Investigation Feasibility Study ("RI/FS") the Federal defendants are without knowledge sufficient to admit or deny the averments of Paragraph 22 of the Complaint concerning contamination of groundwater. The remaining averments of Paragraph 22 of the Complaint state only legal conclusions as to which no answer is required.

23. The averments of Paragraph 23 of the Complaint state only legal conclusions as to which no answer is required.

24. The averments of Paragraph 24 of the Complaint state only legal conclusions as to which no answer is required.

25. The averments of Paragraph 25 of the Complaint state only legal conclusions as to which no answer is required.

26. The averments of Paragraph 26 of the Complaint state only legal conclusions as to which no answer is required.

27. Federal Defendants deny the averments of Paragraph 27 of the Complaint.

28. As to the averments of the first sentence of Paragraph 28, the Federal Defendants admit that radioactive residues have been placed in six pits at the FMPC site. As to the averments of the sixth sentence of Para-

graph 28, it is admitted that radioactive-contaminated material has been placed on the ground. Except as specifically admitted, the averments of the first and sixth sentence of Paragraph 28 are denied. The averments of the second, third, fourth and fifth sentences are admitted. As to the averments of the seventh sentence of Paragraph 28, Federal Defendants admit that radioactive materials have in the past contaminated the soil, air and surface waters at the FMPC, but until completion of the RI/FS the Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining averments of the seventh sentence of Paragraph 28.

29. Federal Defendants admit the averments of the first sentence of Paragraph 29 of the Complaint and that Exhibit E is a copy of the NPDES permit referred to in that sentence. Except as specifically admitted herein, the remaining averments of Paragraph 29 contain only legal conclusions as to which no answer is required.

30. The averments of the first and fourth sentences of Paragraph 30 of the Complaint merely characterize and summarize Exhibit E and, accordingly, no answer is required since that document is the best evidence of its contents. The averments of the second and third sentences of Paragraph 30 state only legal conclusions as to which no answer is required.

31. The averments of Paragraph 31 of the Complaint merely characterize and summarize Exhibit E and, accordingly, no answer is required since that document is the best evidence of its contents.

32. The averments of Paragraph 32 of the Complaint state only legal conclusions as to which no answer is required.

33. The Federal Defendants admit that at various times they have exceeded certain of the effluent limitations set forth in their NPDES permit, and failed to construct portions of the water pollution control facilities in accordance with the schedule set forth in the permit. The remaining averments of Paragraph 33 of the

Complaint state only legal conclusions as to which no answer is required.

34. The averments contained in the first sentence of Paragraph 33 of the Complaint state only legal conclusions as to which no answer is required. Federal Defendants deny the averments contained in the second sentence of Paragraph 34 of the Complaint.

35. Paragraphs 1 through 34 of this Answer are incorporated by reference in response to the allegations of Paragraph 35.

36. The averments of Paragraph 36 of the Complaint state only legal conclusions as to which no answer is required.

37. The averments of Paragraph 37 of the Complaint state only legal conclusions as to which no answer is required.

38. The averments of Paragraph 38 of the Complaint state only legal conclusions as to which no answer is required.

39. The averments of Paragraph 39 of the Complaint state only legal conclusions as to which no answer is required.

40. The averments of Paragraph 40 of the Complaint state only legal conclusions as to which no answer is required.

41. The averments of Paragraph 41 of the Complaint state only legal conclusions as to which no answer is required.

42. The averments of Paragraph 42 of the Complaint state only legal conclusions as to which no answer is required.

43. The averments of Paragraph 43 of the Complaint state only legal conclusions as to which no answer is required. To the extent that Paragraph 43 is deemed to contain averments to which an answer is required, the Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 43.

44. The averments of Paragraph 44 of the Complaint state only legal conclusions as to which no answer is required. Federal Defendants aver that 42 U.S.C. § 9607 (g) has been amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

45. The averments of Paragraph 45 of the Complaint state only legal conclusions as to which no answer is required.

46. Paragraphs 36 through 45 of this Answer are incorporated by reference in response to the allegations of Paragraph 46.

47. The averments of Paragraph 47 of the Complaint state only legal conclusions as to which no answer is required. Federal Defendants nevertheless deny that plaintiff is the natural resources trustee for the natural resources on, over and under the FMPC.

48. Until completion of the RI/FS and the natural resources damages assessment, Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in Paragraph 48 of the Complaint.

49. The averments of Paragraph 49 of the Complaint state only legal conclusions as to which no answer is required.

50. The averments of Paragraph 50 of the Complaint state only legal conclusions as to which no answer is required.

51. The averments of Paragraph 51 of the Complaint state only legal conclusions as to which no answer is required.

52. The averments of the first sentence of Paragraph 52 are denied. The averments of the second sentence of Paragraph 52 state legal conclusions to which no answer is required.

53. The averments of Paragraph 53 of the Complaint state only legal conclusions as to which no answer is required.

54. Federal Defendants admit that they filed their RCRA Part A Permit Application on July 6, 1984, and their RCRA Part B Permit Application on October 30, 1985. Both applications remain pending and no permit has been issued. The remaining averments of Paragraph 54 are denied.

55. As to the first sentence of Paragraph 55, the Federal Defendants admit that hazardous materials were placed at FMPC after November 19, 1980, and continue to be placed there. Federal Defendants also admit that they filed their RCRA Part A Permit Application on July 6, 1984, and their RCRA Part B Permit Application on October 30, 1985, that both applications remain pending, and no permit has been issued. Except as specifically admitted herein, the averments of Paragraph 55 state only legal conclusions as to which no answer is required.

56. The averments of Paragraph 56 of the Complaint state only legal conclusions as to which no answer is required.

57. As to the averments of Paragraph 57, Federal Defendants admit that they filed their RCRA Part A Permit Application on July 6, 1984, and their RCRA Part B Permit Application on October 30, 1985, that both applications remain pending, and no permit has been issued.

58. The averments of Paragraph 58 of the Complaint state only legal conclusions as to which no answer is required.

59. The averments of Paragraph 59 of the Complaint state only legal conclusions as to which no answer is required.

60. The averments of Paragraph 60 of the Complaint state only legal conclusions as to which no answer is required.

61. The averments of Paragraph 61 of the Complaint state only legal conclusions as to which no answer is required.

62. The averments of Paragraph 62 of the Complaint state only legal conclusions as to which no answer is required.

63. The averments of Paragraph 63 of the Complaint are denied.

64. The averments of Paragraph 64 of the Complaint state only legal conclusions as to which no answer is required.

65. The averments of Paragraph 65 of the Complaint state only legal conclusions as to which no answer is required.

66. The averments of Paragraph 66 of the Complaint are denied.

67. The averments of Paragraph 67 of the Complaint state only legal conclusions as to which no answer is required.

68. The averments of Paragraph 68 are denied.

69. The averments of Paragraph 69 of the Complaint state only legal conclusions as to which no answer is required.

70. The averments of Paragraph 70 of the Complaint state only legal conclusions as to which no answer is required.

71. The averments of Paragraph 71 are denied.

72. The averments of Paragraph 72 of the Complaint state only legal conclusions as to which no answer is required.

73. The averments of Paragraph 73 of the Complaint state only legal conclusions as to which no answer is required.

74. The averments of Paragraph 74 of the Complaint state only legal conclusions as to which no answer is required.

75. Federal Defendants deny that they have failed to implement a ground water monitoring system for Pit 4. The remaining averments of Paragraph 75 of the Complaint state only legal conclusions as to which no answer is required.

76. The averments of Paragraph 76 of the Complaint state only legal conclusions as to which no answer is required.

77. The averments of Paragraph 77 of the Complaint state only legal conclusions as to which no answer is required.

78. As to the first sentence of Paragraph 78 of the Complaint, Federal Defendants admit that they first submitted closure plans for the pits at the FMPC at the time that they filed their RCRA Part A Permit Application on July 6, 1984. The averments of the second sentence of Paragraph 78 of the Complaint state only legal conclusions as to which no answer is required.

79. The averments of Paragraph 79 of the Complaint state only legal conclusions as to which no answer is required.

80. The Federal Defendants admit that they have not yet closed Pit 4 and that the final volume of hazardous waste was placed in Pit 4 in approximately April of 1983. Except as specifically admitted, the averments of Paragraph 80 are denied.

81. The averments of Paragraph 81 of the Complaint state only legal conclusions as to which no answer is required.

82. The Federal Defendants admit that they have not yet closed Pit 4. Except as specifically admitted, the averments of Paragraph 82 are denied.

83. The averments of Paragraph 83 of the Complaint state only legal conclusions as to which no answer is required.

84. The averments of Paragraph 84 of the Complaint state only legal conclusions as to which no answer is required.

85. The averments of Paragraph 85 are denied.

86. The averments of Paragraph 86 of the Complaint state only legal conclusions as to which no answer is required.

87. The averments of Paragraph 87 are denied.

88. The averments of Paragraph 88 of the Complaint state only legal conclusions as to which no answer is required.

89. Federal Defendants aver that prior to April of 1984 they maintained schedules requiring regular inspections of the container storage area at the FMPC, that to their best knowledge and belief such inspections were conducted on a weekly basis, and since approximately April of 1984 they have maintained weekly inspections of this area.

90. The averments of Paragraph 90 of the Complaint state only legal conclusions as to which no answer is required.

91. The averments of Paragraph 91 of the Complaint state only legal conclusions as to which no answer is required.

92. The averments of Paragraph 92 are denied.

93. The averments of Paragraph 93 of the Complaint state only legal conclusions as to which no answer is required.

94. The averments of Paragraph 94 of the Complaint state only legal conclusions as to which no answer is required.

95. The averments of Paragraph 95 are denied.

96. The averments of Paragraph 96 of the Complaint state only legal conclusions as to which no answer is required.

97. The averments of Paragraph 97 of the Complaint state only legal conclusions as to which no answer is required.

98. The Federal Defendants admit that as of July of 1984, they had a contingency plan for any FMPC hazardous waste facility. Except as specifically admitted the averments of Paragraph 98 are denied.

99. The averments of Paragraph 99 of the Complaint state only legal conclusions as to which no answer is required.

100. The averments of Paragraph 100 of the Complaint state only legal conclusions as to which no answer is required.

101. The Federal Defendants admit that as of at least June 2, 1984, operating records were kept at the FMPC hazardous facilities containing the information required by law. Except as specifically admitted, the averments of Paragraph 101 are denied.

102. The averments of Paragraph 102 of the Complaint state only legal conclusions as to which no answer is required.

103. The averments of Paragraph 103 of the Complaint state only legal conclusions as to which no answer is required.

104. The averments of Paragraph 104 of the Complaint state only legal conclusions as to which no answer is required.

105. Federal Defendants aver that they have implemented a training program and have maintained records for the FMPC. The remaining averments of Paragraph 105 of the Complaint state only legal conclusions as to which no answer is required.

106. The averments of Paragraph 106 of the Complaint state only legal conclusions as to which no answer is required.

107. The averments of Paragraph 107 of the Complaint state only legal conclusions as to which no answer is required.

108. The averments of Paragraph 108 are admitted.

109. The averments of Paragraph 109 of the Complaint state only legal conclusions as to which no answer is required.

110. The averments of Paragraph 110 of the Complaint state only legal conclusions as to which no answer is required.

111. The averments of Paragraph 111 of the Complaint state only legal conclusions as to which no answer is required.

112. The averments of Paragraph 112 of the Complaint state only legal conclusions as to which no answer is required.

113. The averments of Paragraph 113 are admitted.

114. The averments of Paragraph 114 are admitted.

115. The averments of Paragraph 115 of the Complaint state only legal conclusions as to which no answer is required.

116. The averments of Paragraph 116 are admitted.

117. The averments of Paragraph 117 of the Complaint state only legal conclusions as to which no answer is required.

118. The averments of Paragraph 118 are admitted.

119. The averments of Paragraph 119 of the Complaint state only legal conclusions as to which no answer is required.

120. The averments of Paragraph 120 are admitted.

121. The averments of Paragraph 121 of the Complaint state only legal conclusions as to which no answer is required.

122. The averments of Paragraph 122 are denied.

123. The averments of Paragraph 123 of the Complaint state only legal conclusions as to which no answer is required.

124. The averments of Paragraph 124 are admitted.

125. The averments of Paragraph 125 of the Complaint state only legal conclusions as to which no answer is required.

126. The averments of Paragraph 126 are admitted.

127. The averments of Paragraph 127 of the Complaint state only legal conclusions as to which no answer is required.

128. The averments of Paragraph 128 are denied.

129. The averments of Paragraph 129 of the Complaint state only legal conclusions as to which no answer is required.

130. The averments of Paragraph 130 are denied.

131. The averments of Paragraph 131 of the Complaint state only legal conclusions as to which no answer is required.

132. The averments of Paragraph 132 of the Complaint state only legal conclusions as to which no answer is required.

133. The averments of Paragraph 133 of the Complaint state only legal conclusions as to which no answer is required.

134. The averments of Paragraph 134 of the Complaint state only legal conclusions as to which no answer is required.

135. Paragraphs 36 through 134 of this Answer are incorporated by reference in response to the allegations of Paragraph 135.

136. The averments of Paragraph 136 of the Complaint state only legal conclusions as to which no answer is required.

137. The averments of Paragraph 137 of the Complaint state only legal conclusions as to which no answer is required.

138. The averments of Paragraph 138 of the Complaint state only legal conclusions as to which no answer is required.

139. The averments of Paragraph 139 of the Complaint state only legal conclusions as to which no answer is required.

140. The averments of Paragraph 140 are denied.

141. The averments of Paragraph 141 are denied.

142. The averment is not sufficiently specific to permit an answer. To the extent an answer is required, the averments of Paragraph 142 are denied.

143. The averments of Paragraph 143 are denied.

144. The averments of Paragraph 144 of the Complaint state only legal conclusions as to which no answer is required.

145. The averments of Paragraph 145 of the Complaint state only legal conclusions as to which no answer is required.

PRAYER FOR RELIEF

The Federal Defendants deny that the State of Ohio is entitled to the relief requested in its Complaint and pray for their discharge from the Complaint together with all costs and all other appropriate or available relief.

GENERAL DENIAL

To the extent that any allegations in the Complaint are not specifically answered or addressed herein, such allegations shall be deemed specifically denied.

FIRST DEFENSE

Ohio's Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Ohio's Complaint is barred by the doctrine of sovereign immunity.

THIRD DEFENSE

Ohio's Complaint is barred for lack of subject-matter jurisdiction.

FOURTH DEFENSE

Ohio's claim for response costs are unrecoverable to the extent they are duplicative, not cost effective or otherwise inconsistent with the National Contingency Plan.

FIFTH DEFENSE

Ohio's claim for natural resource damages is limited to any residual damages remaining after implementation of the remedy at the FMPC.

SIXTH DEFENSE

Ohio's recovery of natural resources damages, if any, at the FMPC is limited to the lesser of lost use value or resortation costs.

SEVENTH DEFENSE

The hazardous waste laws and regulations of the State of Ohio do not regulate mixed waste, *i.e.*, hazardous waste mixed with radioactive waste, and therefore the handling of mixed waste at the FMPC is regulated by the provisions of RCRA and the Atomic Energy Act. The State of Ohio is thus not entitled to any relief under on its claims based upon Federal Defendants' handling of mixed waste.

EIGHTH DEFENSE

The Atomic Energy Act preempts any state regulation of source, special and by-product nuclear materials and wastes and the radioactive hazards associated with hazardous wastes and hazardous constituents which have become moixed with source, special or by-product nuclear materials. Therefore, the state of Ohio lack jurisdiction or authority to regulate such materials or waste.

NINTH DEFENSE

The Atomic Energy Act preempts any state regulation of source, special and by-product nuclear materials and wastes when they are mixed with or inextricably intertwined with otherwise hazardous materials or waste. Therefore the State of Ohio lacks jurisdiction or authority to regulate such materials or waste.

TENTH DEFENSE

Counts three through twenty-six of Ohio's complaint are barred by Ohio Rev. Code §§ 2305.07, 2305.11 and other relevant statutes of limitations.

ELEVENTH DEFENSE

Counts three through twenty-six of Ohio's Complaint are barred by equitable estoppel.

TWELFTH DEFENSE

Counts three through twenty-six of Ohio's Complaint are barred by laches.

THIRTEENTH DEFENSE

Counts three through twenty-six of Ohio's Complaint are barred because Ohio has by its actions waived its right to seek the relief set forth in those counts.

FOURTEENTH DEFENSE

County twenty-seven of the Complaint is barred by the provisions of section 10 of Executive Order 12580 (January 23, 1987), reprinted at 52 F.R. 2923.

Respectfully submitted,

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Dated: April 28, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-86-0217
Judge Spiegel

STATE OF OHIO, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
DEFENDANTS

CONSENT DECREE

[Filed Dec. 2, 1988]

WHEREAS, on March 11, 1986, the State of Ohio filed a complaint in the above-captioned case against the United States Department of Energy ("DOE"), NLO, Inc. ("NLO") and NL Industries, Inc. ("NLI");

WHEREAS, Ohio alleges that DOE, NLO, and NLI have violated various provisions of Federal and Ohio law and regulations, and DOE, NLO, and NLI deny any violation of and any liability under any federal or state statute, regulation or common law;

WHEREAS, the parties wish to ensure the safe and environmentally sound handling of mixed and hazardous waste at the FMPC;

WHEREAS, the parties agree that the Federal and Ohio hazardous waste regulations as presently drawn do not impose dissimilar requirements;

WHEREAS, DOE on July 18, 1986 entered into an Agreement with U.S. EPA (hereinafter the agreement

as amended shall be referred to as the "7/18/86 Agreement") pursuant to Executive Order 12088, 43 F.R. 47707 (October 13, 1978), and is currently carrying out a Remedial Investigation and Feasibility Study (hereinafter "RI/FS") pursuant to the 7/18/86 Agreement and the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §§ 9601-9657 (hereinafter "CERCLA");

WHEREAS, the parties wish to resolve Count One and Counts Three through Twenty-Seven of this action without litigation to the extent set forth in Sections V and VII below, and have, therefore, agreed to entry of this Consent Decree without the admission or adjudication of any issue of fact or law.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed as follows:

I. JURISDICTION

The Court has jurisdiction over the matters resolved in this Consent Decree and the parties to the decree.

II. GENERAL PROVISIONS

For purposes of this Consent Decree, the following words and abbreviations have the meanings provided below:

2.1 "DOE" means the United States Department of Energy and its officers, agents, employees, and contractors;

2.2 "Ohio EPA" means Ohio Environmental Protection Agency and its representatives, including any contractor(s) retained by Ohio EPA to perform any monitoring, observation, testing, or other activities related to this Consent Decree;

2.3 "NLO" means NLO, Inc., an Ohio corporation which was the prime contractor at the FMPC through December 31, 1985.

2.4 "NLI" means NL Industries, Inc., a New Jersey corporation.

2.5 Each of the terms "State", "State of Ohio", and "Ohio", includes all agencies and officers of the State of Ohio;

2.6 "FMPC" means the Feed Materials Production Center owned by DOE and located near Fernald, Ohio;

2.7 "C.F.R." means Code of Federal Regulations;

2.8 "OAC" means Ohio Administrative Code;

2.9 "Hazardous waste" means a solid waste which is defined as a hazardous waste in 40 C.F.R. § 261 or OAC § 3745-51-03, but does not include source, special nuclear, or by-product material. For purposes of convenience in the wording of this Consent Decree only (and not binding on the parties outside of this Decree and not for use as a general definition outside Decree), the term "hazardous waste" does not include "mixed waste".

2.10 "Mixed waste" means all waste containing both radioactive waste subject to the Atomic Energy Act and hazardous waste.

2.11 "Treatment", "storage", and "disposal" have the same meaning as the definitions provided therefor in 40 C.F.R. § 260.10 and OAC § 3745-50-10.

III. HAZARDOUS WASTE REQUIREMENTS

3.1 DOE shall conduct its current and future treatment, storage, and disposal of all hazardous and mixed waste at the FMPC in accordance with Federal and Ohio hazardous waste laws and hazardous waste regulations, including but not limited to the permit requirements of these laws and regulations. However, DOE is not required to comply with the above requirements, with regard to mixed waste, where compliance will increase the risk to human safety and health or the environment, or, with respect to hazardous or mixed waste, where the requirements would be inapplicable due to the restrictions of 42 U.S.C. § 6905(a). Should DOE not be required to comply with a hazardous waste requirement due to any

of the circumstances described in the preceding sentence, DOE in consultation with Ohio EPA shall instead handle the hazardous or mixed waste in a manner as protective of human safety and health and the environment as if the hazardous waste requirement had been applied. However, should any of the above referenced requirements conflict with any remedy ultimately selected by U.S. E.P.A. pursuant to CERCLA, such conflicts shall be subject to the provisions of Sections V and XII of this Consent Decree.

3.2 DOE has submitted to Ohio EPA Part A and Part B of the application for an Ohio hazardous waste facility installation and operation permit for the FMPC. Until such time as the Ohio Hazardous Waste Facility Board acts on the permit application for the FMPC, DOE shall not store or dispose of hazardous or mixed waste at any FMPC locations, or treat any such waste at FMPC in any devices, not included in the permit application or subsequent revisions submitted to Ohio EPA. No hazardous or mixed waste from an off-site source not already listed in the FMPC Part B Permit Application, or a revision as of the date of entry of this Consent Decree, shall be stored, disposed of or treated at the FMPC without the prior approval of the State of Ohio. After the Ohio Hazardous Waste Facility Board acts on the permit application for such a facility, DOE shall not store, dispose of, or treat mixed waste at the FMPC except in accordance with an Ohio hazardous waste facility installation and operation permit. Nothing in this Consent Decree shall be construed to preclude DOE from exercising any right it has to appeal an action on the permit application nor shall the Consent Decree be interpreted to predetermine the results of the deliberations of the Ohio Hazardous Waste Facilities Board on the permit application.

3.3 DOE shall store all drums and other containers holding hazardous waste and or mixed waste in a manner which complies with the containment storage system re-

quirements set forth in 40 C.F.R. § 264.175 and OAC § 3745-55-75.

3.4 DOE shall conduct and document inspections of hazardous waste and mixed waste facilities at FMPC, including container or tank storage areas, landfills, and surface impoundments, in accordance with 40 C.F.R. § 264.15, 40 C.F.R. § 265.15, OAC § 3745-54-15 and OAC § 3745-65-15.[1] These inspections shall be conducted at a frequency sufficient to comply with these rules, but in no event shall they be conducted at a frequency of less than once per week. Upon discovery of any leaks or spills of hazardous or mixed waste from container or tank storage or treatment areas, DOE shall immediately thereafter initiate efforts to stop the spills or leaks, take all appropriate actions necessary to prevent further spills or leaks of hazardous or mixed wastes, and take all appropriate actions possible to contain and recover all spilled and leaked hazardous or mixed waste. Should the groundwater monitoring program reveal the presence of a hazardous or mixed waste, then a groundwater quality assessment will be initiated, and shall be performed consistent with RCRA guidelines and Ohio and Federal law.

3.5 Within ninety (90) days after entry of this Consent Decree, DOE shall complete and submit to Ohio EPA analyses of all hazardous or mixed waste streams produced or received at FMPC. These analyses shall contain the information required by 40 C.F.R. § 265.13 and OAC § 3745-65-13, as well as the radiological characteristics of the waste streams, a description of the process streams producing the wastes, and any applicable EPA hazardous waste number. If any additional hazardous or mixed waste stream is identified at the FMPC after the entry of this Consent Decree, DOE shall complete and

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[1] 40 C.F.R. § 265.15 applies until U.S. EPA approval of DOE's Part B hazardous waste application, and 40 C.F.R. § 264.15 applies thereafter. OAC § 3745-65-15 applies until Ohio Hazardous Waste Facility Board approval of DOE's Part B hazardous waste application, and OAC § 3745-54-15 applies thereafter.

submit these analyses and/or characteristics, consistent with 40 C.F.R. § 265.13 and OAC § 3745-65-13,[2] within ninety (90) days after identifying the waste stream on-site; if any additional hazardous or mixed waste stream is to be received at the FMPC from an off-site source, or is to be produced at the FMPC, DOE shall complete and submit such analyses and/or characteristics before receiving the waste stream from off-site or producing the waste stream on-site.

3.6 DOE shall keep a written operating record at FMPC which contains the information required by 40 C.F.R. § 264.73, 40 C.F.R. § 265.73, OAC § 3745-54-73 and OAC § 3745-65-73.[3] The operating record shall include this information for all hazardous waste and mixed waste which was stored at the FMPC prior to the entry of this Consent Decree (unless it has been since removed from FMPC) and shall be updated whenever additional hazardous or mixed waste is stored there in the future.

3.7 DOE has submitted to Ohio EPA for review and approval a groundwater quality assessment program plan. Ohio EPA has reviewed this plan and identified deficiencies in it. DOE shall correct these deficiencies and resubmit the plan to Ohio EPA within forty-five (45) days after receiving Ohio EPA's comments. DOE shall implement the plan in accordance with the approved timetable.

3.8 The specific requirements spelled out in paragraphs 3.3 through 3.7 above do not replace or supersede any

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[2] 40 C.F.R. § 265.13 applies until U.S. EPA approval of DOE's Part B hazardous waste application, and 40 C.F.R. § 264.13 applies thereafter. OAC § 3745-65-13 applies until Ohio Hazardous Waste Facility Board approval of DOE's Part B hazardous waste application and OAC § 3745-54-13 applies thereafter.

[3] 40 C.F.R. § 265.73 applies until U.S. EPA approval of DOE's Part B hazardous waste application, and 40 C.F.R. § 264.73 applies thereafter. OAC § 3745-65-72 applies until Ohio Hazardous Waste Facility Board approval of DOE's Part B hazardous waste application, and OAC § 3745-54-73 applies thereafter.

additional requirements which may be contained in the regulations cited in those paragraphs or in other hazardous waste laws or regulations, to the extent not inconsistent with the Atomic Energy Act.

IV. CONTROL OF WASTEWATER AND RUNOFF

4.1 Upon entry of this Consent Decree, no "sewage," "industrial waste" or "other wastes," as those terms are defined by Ohio Revised Code Section 6111.01, shall be discharged or placed into Waste Pit #5 or the clear well at the FMPC without prior written approval of Ohio EPA. The only exception to this order is the storm water runoff currently being collected in the waste pit area.

4.2 No water from Waste Pits Number 4, 5, or 6, the biodenitrification surge lagoon, the biodenitrification surge lagoon underdrains, or storm water retention basin underdrains shall be discharged or placed into Paddy's Run, unless prior written approval is obtained from Ohio EPA.

4.3 On or about July 27, 1988, DOE completed a characterization study within the coal storage area and coal storage runoff collection basin area to characterize the existing underlying soil. On or before November 4, 1988, DOE shall submit a report which contains the results of the characterization study including the determined permeability coefficient of the soil core samples and, if necessary, the steps required to modify the existing soil conditions to provide groundwater protection equivalent to that provided by three (3) feet of clay with a permeability coefficient no greater than $1x10^{-7}$ centimeters per second. Ohio EPA agrees to provide a written response to DOE within thirty (30) days of receipt of the report as to whether or not a liner is needed.

[A] In the event Ohio EPA determines a liner is required for the coal pile storage area and/or the coal pile run off collection basin, DOE shall submit a PTI application and install the liner in accordance with schedules approved by Ohio EPA.

[B] In the event that Ohio EPA determines a liner is not required, DOE shall submit a PTI application describing the existing coal pile storage area and coal pile runoff collection and treatment system within ninety (90) days of Ohio EPA's written response to the report.

4.4 DOE has submitted a current, complete NPDES permit renewal application. Until Ohio EPA issues a new NPDES permit for FMPC, DOE shall make every effort to manage its wastewater in such a way as to comply with the biochemical oxygen demand, solids, and fecal coliform limitations of its present NPDES permit. Until Ohio EPA issues a new NPDES permit for FMPC, DOE shall comply with all other terms (excluding part I.B), conditions and effluent limitations of its present NPDES permit. DOE shall comply with all terms, conditions, and effluent limitations of its new NPDES permit by the dates specified in the permit. The date for final compliance shall in no case be later than one (1) year after issuance of the Ohio Permit to Install for the biodenitrification effluent treatment system.

4.5 Within one hundred and eighty (180) days of issuance of a new FMPC NPDES permit, DOE shall submit to Ohio EPA a new Permit to Install application, including detail plans, for a biodenitrification effluent treatment system designed to meet the biochemical oxygen demand and suspended solids limitations of the new FMPC NPDES permit.

4.6 By October 1, 1989, DOE shall submit to Ohio EPA a new Permit to Install application, including detail plans, for the full-scale biodenitrification facility. These plans must include all temporary as well as permanent collection, storage, and treatment system components.

4.7 DOE has begun construction of a storm water retention basin, and shall complete construction by December 31, 1988, in accordance with the detail plans approved by Ohio EPA on November 18, 1987 (PTI 05-1043).

DOE shall thereafter operate the storm water retention system in accordance with the approved plans.

4.8 DOE has submitted to Ohio EPA a contingency plan which describes the actions DOE will take to investigate the environmental impact of any future surface water leakage, overflow or bypass from the storm water retention system into the environment, including Paddy's Run. Ohio EPA has identified deficiencies in the plan and will transmit these to DOE. DOE shall, within sixty (60) days after receiving notice of these deficiencies, correct these deficiencies and submit a revised plan to Ohio EPA. DOE shall implement the provisions of the approved contingency plan if surface water leaks from, overflows, or bypasses the storm water retention system.

4.9 Sediments accumulating in the biodenitrification surge lagoon and storm water retention basins shall be removed and disposed of in accordance with the maintenance schedules aprpoved in Permits to Install #05-2872 and #05-1043.

4.10 DOE shall contain any process area spills and divert the spills for adequate treatment and/or disposal, in accordance with the Spill Prevention and Control Countermeasures Plan to be submitted to Ohio EPA for review and approval within thirty (30) days of the entry of this Consent Decree.

4.11 Pursuant to Ohio EPA Director's Findings and Orders dated June 26, 1987, DOE has submitted to Ohio EPA for review and comment a best management practices (BMP) plan for the control of industrial wastes and other wastes that may be discharged from the FMPC. For the purpose of this section, "industrial wastes" and "other wastes" have the meaning set forth in Ohio Revised Code Section 6111.01(C) and (D). The BMP Plan establishes procedures for inspections, monitoring, preventive maintenance, employee training, material inventory, security and other activities to prevent pollution of surface waters and groundwater in the event of equipment failure, improper operation, precipitation and other

natural phenomena, stormwater runoff and discharges, and other causes.

[A] DOE shall implement the BMP plan upon notification of approval of the plan by Ohio EPA. In the event that Ohio EPA does not approve the BMP plan in its entirety, DOE shall implement those portions of the plan approved by Ohio EPA, correct any deficiencies in the plan noted by Ohio EPA, and resubmit a revised plan for review by Ohio EPA not later than sixty (60) days from notification by Ohio EPA.

[B] DOE shall maintain the BMP plan at the FMPC and shall make it available to Ohio EPA upon request.

[C] DOE shall amend the BMP plan whenever there is a change in facility design, construction, operation, or maintenance which materially affects the facility's potential for discharge of industrial wastes or other wastes into the water of the State.

[D] If Ohio EPA determines that the BMP plan is ineffective in achieving the general objective of preventing the release of industrial wastes or other wastes to the waters of the State, the BMP plan shall be modified by DOE in consultation with Ohio EPA within forty-five (45) days of notification to DOE.

4.12 Pursuant to Ohio EPA Director's Findings and Orders issued June 26, 1987, DOE has submitted to Ohio EPA a report which incorporates a study of the discharge from the FMPC which currently flows from Manhole 175 (Outfall 001) through a pipe to the Great Miami River. This study was conducted to determine whether or not the discharge pipe is a potential source of groundwater

contamination. Should Ohio EPA request changes and/or additions in the report of this study, including any of the recommended alternatives or schedules, DOE shall submit these changes and/or additions to Ohio EPA within thirty (30) days after receiving these requests. All actions and alternatives recommended by the report of the study required in this Paragraph 4.12 and approved by the Ohio EPA shall be implemented in accordance with the schedules approved by Ohio EPA.

4.13 By the twentieth (20th) day of every second month, DOE shall submit a bi-monthly technical progress report to Ohio EPA describing the progress made to comply with this Section IV of the Consent Decree during the previous two months. DOE may combine this report with its ongoing reports being submitted pursuant to the Director's Findings and Orders issued June 4, 1987.

4.14 DOE is enjoined to comply with any permits issued to DOE pursuant to OAC § 6111.03(J) and, with regard to sewage, industrial wastes or other wastes, to comply with OAC § 3745-31-02 and any permits issued pursuant to OAC § 3745-31-02.

V. RESERVATION OF RIGHTS CONCERNING REMEDIAL ACTION

5.1 DOE is currently proceeding with an RI/FS pursuant to the 7/18/86 Agreement. Included within the scope of the RI/FS are work plans, which contain, but are not limited to, the following:

[A] actions which will be taken to determine the locations of hazardous and mixed waste at the FMPC, if any, including but not limited to investigation of the storage pits, the liquid waste incinerator, solid waste incinerator, and the general sump;

[B] actions which will be taken to analyze such waste, including the identification of the analyses to be performed;

[C] actions which will be taken to determine whether hazardous constituents are being released or have the potential to be released from the storage pits into the environment;

[D] actions which will be taken to assess the feasibility of all alternatives available for the permanent disposal of such waste as well as a proposed schedule for each available alternative;

[E] actions which will be taken, if a release of hazardous constituent(s) into the environment is discovered, to assess the feasibility of all alternatives available for remedying contamination of the environment, if any, including a proposed schedule for implementation of each alternative;

[F] a timetable for performing each of the actions described in A through E above and submitting the information obtained from performing these actions;

[G] alternatives for permanent disposal of any hazardous and mixed waste in the storage pits;

[H] a work plan and timetable for studying the sources, nature and extent of groundwater contamination, if any, with nitrates, fluorides, sulfates, chlorides, and other "industrial wastes" and "other wastes," as those terms are defined by Ohio Revised Code Section 6111.01(C) and (D), including, if contamination is discovered, an assessment of the exposure and potential exposure of the public and the environment to these contaminants and compilation of data necessary to develop and select alternatives for abating the sources of contamination and to develop and select cleanup alternatives.

5.2 The activities described in paragraph 5.1 above are also the subject matter of injuntive relief which Ohio has requested against DOE for alleged violations of the Resource Conservation and Recovery Act (hereinafter "RCRA"), Ohio Revised Code Chapter 3734, the Clean Water Act, and Ohio Revised Code Chapter 6111. These alleged violations are contained in Counts Three through Eight and Count Twenty-Five of the Complaint.

5.3 Pursuant to the 7/18/86 Agreement, remedial alternatives will be developed by DOE and selected to address, *inter alia*, the matters described in paragraph 5.1 above.

5.4 It is DOE's position that Ohio EPA is limited to the review and comment provisions and provisions for judicial review set forth in sections 120 and 121 of CERCLA if the state has any disagreement with any matter under the RI/FS, including cleanup standards, investigation methods, timetables and the remedial alternative selected by US EPA. It is Ohio's position that the state has the authority to determine these matters pursuant to Ohio law and RCRA, and to obtain injunctive relief against DOE pertaining to these issues pursuant to Counts Three through Eight and Count Twenty-Five of the Complaint and the statutes invoked by these counts. DOE and the State specifically do not resolve this dispute in this Consent Decree. Each party specifically reserves the right to reopen this action for further litigation for the purpose of resolving any disagreement which Ohio may have with any of these matters under the RI/FS, including, but not limited to, cleanup standards, investigation methods, timetables, or the final remedial action chosen by US EPA under the 7/18/86 Agreement. Ohio reserves the right to request further injunctive relief against DOE pursuant to Counts Three through Eight and Count Twenty-Five of the Complaint should Ohio at any time become dissatisfied with the manner or timeliness of actions or study taken pursuant to the RI/FS or the manner or timeliness of remedial action

occurring after completion of the RI/FS. Each party reserves its rights to assert and defend its respective legal position should the action be reopened for these purposes.

VI. SITE ACCESS

DOE shall provide access to the FMPC to Ohio EPA for the purpose of monitoring, sampling and observing activities carried out under this Consent Decree. Ohio EPA agrees that it will comply with all statutes, rules and regulations for personnel safety and site security. This paragraph shall not be construed to eliminate or restrict any State access to the FMPC which it may otherwise have under Federal or State law.

VII. RECOVERY OF RESPONSE COSTS AND SETTLEMENT OF OTHER MONETARY CLAIMS

7.1 "Response costs" as used in this section means all costs of "removal" or "remedial action," as defined by Section 101(23), (24), and (25) of CERCLA, 42 U.S.C. § 9601 (23), (24), and (25).

7.2 By March 1, preceding each federal fiscal year during which the State expects to incur response costs, the State shall provide DOE with a written estimate of response costs expected to be incurred during the two subsequent fiscal years, based upon the state's best knowledge at the time. By February 1 of each year DOE shall send Ohio EPA a notice requesting this estimate.

7.3 Following the end of each federal fiscal year, the State shall submit to DOE an accounting of response costs incurred during that previous fiscal year. These accountings will specify the manner in which the payment shall be made.

7.4 Except as allowed by Paragraph 7.5 below, within ninety (90) days of receipt of the accounting provided pursuant to Paragraph 7.3, DOE shall reimburse the State in the amounts set forth in the accounting. Payment shall be made by wire transfer or by check in the manner described in the State's accounting.

7.5 In the event that DOE disputes any amounts set forth in the State accounting, DOE may contest the disputed costs by invoking the dispute resolution procedures of Section XII. DOE may contest a cost only on the grounds that the cost is unsupported by the State's documentation, is not a "response cost" under CERCLA, or is inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"). DOE shall bear the burden of demonstrating that the cost is inconsistent with the NCP.

7.6 Should DOE contest a portion of the costs set forth in an accounting but not all of the costs, the uncontested costs shall be paid by the deadline provided by paragraph 7.4 above. Any costs which DOE must pay as a result of dispute resolution shall be paid within ninety (90) days after resolution of the dispute.

7.7 Not later than thirty (30) days after the entry of this Consent Decree, NLO shall pay to the State of Ohio in full and final settlement of disputed claims brought by the State of Ohio against NLO in this action under Count One and Counts Three through Twenty-seven, the sum of Two Hundred Seventy-Five Thousand Dollars ($275,000) by certified check or by wire transfer payable to the order of "Treasurer, State of Ohio", for deposit into the "Hazardous Waste Cleanup Fund".

7.8 Not later than thirty (30) days after the entry of this Consent Decree, DOE shall pay to the State of Ohio in full and final settlement of disputed claims brought by the State of Ohio against DOE for all past response costs in this action incurred by the state through September 30, 1988, the sum of Three Hundred Thirty-Five Thousand Dollars ($335,000) by certified check or by wire transfer payable to the order of "Treasurer, State of Ohio", for deposit into the "Hazardous Waste Cleanup Fund", and the sum of Eighty Thousand Dollars ($80,000) for litigation costs by certified check or wire transfer to the order of "Ohio Attorney General".

7.9 With regard to the State of Ohio's claims against DOE for civil penalties, the Court has separately granted DOE's Motion to certify for interlocutory appeal the Order Denying Motion to Dismiss issued by the Court on March 18, 1988, which held that the United States has waived sovereign immunity under RCRA and the CWA for the imposition of civil penalties and that DOE could be liable for such penalties in this case. The parties have entered into a stipulation settling the amount of civil penalties to be assessed against DOE, if, after exhaustion of all appellate rights by DOE, the ultimate decision in this case is that a waiver of Federal sovereign immunity has been made by RCRA or the CWA with regard to any of the State's civil penalty claims. In such a case, judgment will be entered in accordance with the stipulation. If, after exhaustion of all appellate rights by the State the ultimate decision in this case is that no waiver of Federal sovereign immunity has been made by RCRA or the CWA with regard to any of the State's civil penalty claims, judgment shall be entered on these issues in accordance with the ultimate decision.

VIII. RELEASES

8.1 Except as specified below, the State hereby releases, covenants not to sue and not to bring any action, whether civil, criminal or for administrative findings and orders, against NLO, NLI, the United States or any department or agency thereof, or any past or present officer, director, official, employee, agent, or contractor (and any past or present official, officer, director, employee, agent or sub-contractor of such contractor), of NLO, NLI, or the United States, with respect to the claims contained in Count One and Counts Three through Twenty-Seven of the Complaint filed in this action.

8.2 The parties recognize that this Consent Decree does not address any of the claims contained in Count Two of the Complaint. This Count is stayed until completion of the RI/FS, and thus remains pending. This

Consent Decree also does not resolve the matters reserved in Section V.

8.3 By executing this Consent Decree, the State of Ohio expressly reserves for further action or enforcement and does not discharge, release, or in any way affect any right, demand, claim, or cause of action which it has, or may have, against any person or entity not released in paragraph 8.1 above.

8.4 The parties agree to cooperate with each other in identifying other potential sources of contamination which may affect the FMPC or the surrounding area.

IX. COMPLIANCE

Except as specifically set forth in this Consent Decree, DOE shall not be excused from compliance with any applicable federal and state laws in carrying out the provisions of this Consent Decree. DOE agrees to advise the State of Ohio of its efforts to obtain the appropriated funding necessary to implement this Consent Decree. The State of Ohio and DOE agree that in any judicial proceeding seeking to enforce the terms of this Consent Decree and/or to find DOE in contempt for failure to comply or for delay in compliance with such terms, DOE may raise as a defense that its failure or delay was caused by circumstances beyond its control or that such failure or delay was caused by the unavailability of appropriated funds. While the State of Ohio disagrees that such defenses exist, the parties do agree and stipulate that it is premature at this time to raise and adjudicate the existence of such defenses.

X. PERMITS AND APPROVALS

The State of Ohio will use its best efforts to review in a timely manner, following DOE application, any permits necessary for DOE to carry out the work required pursuant to this Consent Decree.

XI. USE OF DECREE

This Consent Decree was negotiated and executed by the parties in good faith to avoid expensive and protracted litigation and is a settlement of claims which were vigorously contested, denied and disputed as to validity and amount. The execution of this Consent Decree is not an admission of liability with regard to any issue dealt with in this Consent Decree. Accordingly, it is the intention of the parties, the parties hereby agree, and the Court Orders, that with the exception of this proceeding, any proceeding to adjudicate a permit application (but only to the extent necessary to prove the requirements of the Consent Decree), any proceeding reserved under Section V, and any other proceeding brought by the parties to enforce this Consent Decree, this Consent Decree shall not be admissible in any judicial or administrative proceeding whether civil or criminal, or in state or federal court, and regardless of whether the gravamen of such action or proceeding is based in tort, contract or statute.

XII. RESOLUTION OF DISPUTES

12.1 Should Ohio or DOE have a good faith dispute over the interpretation of this Consent Decree, over whether a term of this Consent Decree has been violated, or over the amount of response costs paid pursuant to Section VII, or if the actions or requirements imposed on DOE by Ohio pursuant to this Consent Decree conflict with actions or requirements imposed on DOE by U.S. EPA pursuant to the 7/18/86 Agreement, the procedures of this section shall apply except as specifically set forth elsewhere in this Consent Decree. Because Ohio and DOE disagree over whether actions or requirements imposed on DOE by Ohio pursuant to this Consent Decree take precedence over actions or requirements imposed on DOE by U.S. EPA pursuant to the 7/18/86 Agreement in the event of a conflict between the two,

this Consent Decree shall not be construed to establish the authority of one over the other. Each party reserves its right to assert and defend its respective legal position on this issue should such a conflict not be resolved by the parties pursuant to this section of the Consent Decree.

12.2 If either Ohio or DOE believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, either party may petition the Court for relief without following the dispute resolution procedures of this section.

12.3 During the pendency of any dispute, Ohio and DOE agree that they shall continue to implement those portions of this Consent Decree which are not in dispute and which Ohio determines can be reasonably implemented pending final resolution of the issue(s) in dispute. If Ohio determines that all or part of those portions of work which are affected by the dispute should stop during the pendency of the dispute, DOE shall discontinue implementing those portions of the work. Ohio and DOE agree they shall make reasonable efforts to informally resolve all disputes.

12.4 DOE shall, within fifteen (15) days of any action by Ohio which it is disputing, provide Ohio with a written notice of dispute. DOE shall, within thirty (30) days of any such action by Ohio which it is disputing, provide Ohio with a written statement of dispute setting forth the nature of the dispute, DOE's position with respect to the dispute and the information DOE is relying upon to support its position. If DOE does not provide such written notice within the fifteen (15) day period, or after such notice fails to provide a written statement to Ohio within the thirty (30) day period, DOE shall be deemed to have agreed to the position taken by Ohio.

12.5 Upon receipt of the written statement of dispute, Ohio and DOE shall engage in dispute resolution among the project coordinators. The project coordinators

shall have fourteen (14) days from the receipt by Ohio of the written statement of dispute to resolve the dispute. During this period the project coordinators shall meet or confer by telephone as many times as necessary to discuss and attempt resolution of the dispute. If a resolution cannot be reached on any issue within this fourteen (14) day period, either Ohio or DOE may, by written notice, elevate the dispute to the Dispute Resolution Committee (DRC) for resolution.

12.6 DOE and Ohio shall each designate one individual to serve on the DRC. The individuals designated to serve on the DRC shall be those designated in Subparagraph 12.7, or their delegate authorized to serve on the DRC on behalf of such designated individual, for the purposes of dispute resolution under this Consent Decree. The DRC will serve as a forum for resolution of disputes for which agreement has not been reached pursuant to paragraph 12.5. If both designated members of the DRC do not agree on a resolution of the dispute within thirty (30) days, either party may institute an action in this Court to resolve the dispute under this Consent Decree.

12.7 The Ohio designated member of the DRC is the Chief, Division of Solid and Hazardous Waste Management, Ohio EPA. The DOE designated member is the DOE Site Manager. Notice of any delegation of authority from a Party's designated member on the DRC shall be provided to all other Parties.

12.8 The pendency of any dispute under this Part shall not affect DOE's responsibility for timely performance of the work required by this Consent Decree, except that the time period for completion of work affected by such dispute shall be extended for a period of time not to exceed the actual time taken to resolve any good faith dispute in accordance with the procedures specified herein if the parties agree that the performance of such work could not reasonably continue during the pendency of such dispute. All elements of the work re-

quired by this Consent Decree which are not affected by the dispute shall continue and be completed in accordance with the work plan schedule.

12.9 Within fourteen (14) days of resolution of any dispute, DOE shall incorporate the resolution and final determination into the appropriate plan, schedule or procedures and proceed to implement this Consent Decree according to the amended plan, schedule or procedures.

12.10 Resolution of a dispute pursuant to this section of the Consent Decree constitutes a final resolution of any dispute arising under this Consent Decree.

12.11 In the case of a dispute which is referred to the DRC and which involves any potential conflict with DOE's actions under the RI/FS or the 7/18/86 Agreement (including but not limited to cleanup standards, investigation methods, timetables and remedial actions), an appropriate representative from U.S. EPA shall be invited to participate in the deliberations of the DRC. If the DRC is unable to resolve the dispute, Ohio and DOE retain the rights described in Section V of this Consent Decree.

12.12 In any dispute subject to dispute resolution, the parties may by written agreement modify the procedures of subparagraphs 12.1 through 12.11 above, including but not limited to an extension or shortening of the times therein or the waiver of any provision set forth therein.

XIII. EFFECTIVE AND TERMINATION DATES

13.1 This Consent Decree shall be effective upon the date of its entry by the Court.

13.2 This Consent Decree shall terminate as to DOE upon completion of the mandatory relief ordered herein, or upon the passage of five (5) years from its effective date, whichever is later.

13.3 This Consent Decree shall terminate as to NLO upon the payment in full of the amounts required in Paragraph 7.7.

XIV. MISCELLANEOUS

14.1 DOE shall require that all of its contractors operating the FMPC comply with all applicable hazardous waste and water pollution laws and the provisions of this Consent Decree.

14.2 Without predetermining whether or not the President can exempt the facility from any provisions of this Consent Decree, nothing in this Consent Decree shall preclude, restrict or expand any right or authority of the President of the United States contained in 33 U.S.C. § 1323, 42 U.S.C. § 6961, or 42 U.S.C. § 9620(j).

14.3 The Court shall maintain jurisdiction of the claims of the State for the purpose of enabling the parties to apply to the Court for any further orders that may be necessary to construe, carry out, or enforce compliance with the terms and conditions set forth in this Consent Decree.

SO ORDERED this 2nd day of December, 1988.

/s/ S. Arthur Spiegel
S. ARTHUR SPIEGEL
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-86-0217
Judge Spiegel

STATE OF OHIO, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
DEFENDANTS

STIPULATION BETWEEN THE DEPARTMENT OF ENERGY AND THE STATE OF OHIO RELATING TO THE STATE OF OHIO'S CLAIMS FOR CIVIL PENALTIES

[Filed Dec. 2, 1988]

I. INTRODUCTION

On March 18, 1988, the Court denied the Department of Energy's ("DOE") Motion to Dismiss and ruled that the United States has waived federal sovereign immunity under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991i ("RCRA"), and the Clean Water Act, 33 U.S.C. §§ 1251-1376 ("CWA"), for the imposition of civil penalties and that the State of Ohio is entitled to assert civil penalty claims against DOE in this case. On September 23, 1988, the Court certified its March 18, 1988 Order for interlocutory appeal to the 6th Circuit Court of Appeals, and DOE filed its Motion for Interlocutory Appeal with the 6th Circuit on October 3, 1988.

The parties have now negotiated a Consent Decree which settles all claims in this action except Ohio's claims

for Natural Resource Damages under Count Two (which is stayed until completion of the Remedial Investigation/ Feasibility Study) and Ohio's claims for civil penalties.

In order to save both the Court and the parties the enormous time and expense of litigating Ohio's civil penalty claims should this matter come to trial prior to completion of the appeal, or should the appellate court affirm this Court's Order, the parties have entered into this Stipulation to provide for disposition without trial of Ohio's civil penalty claims after resolution of all appeals which are pursued concerning the March 18, 1988 Order Denying Motion to Dismiss. As provided herein, payments will be made by DOE, if at all, the judgment entered pursuant to this Stipulation, only after final resolution of all appeals of the March 18, 1988 Order pursued by the parties, including a petition for a writ of certiorari from the United States Supreme Court.

For purposes of this Stipulation, "completition of the appeal" shall mean the exhaustion of all appeals of the March 18, 1988 Order, including any remands and appeals of such remands, and shall occur on the later of (a) the last date on which a petition for a writ of certiorari can be filed in the United States Supreme Court with regard to a decision in this case by the United States Court of Appeals for the Sixth Circuit, if such a petition is *not* filed; (b) if a petition for a writ of certiorari is filed, the date on which the petition is denied by the Supreme Court, or if a petition for rehearing such denial is filed, the date on which the petition for rehearing is denied; or (c) if a petition for writ of certiorari is granted, the date on which the opinion or order of the Supreme Court is issued, or if a petition for rehearing is filed, the date on which the petition for rehearing is denied or the final opinion or order on rehearing is issued.

It is the agreement of the parties that, if civil penalties are paid by DOE pursuant to this Stipulation, the maximum civil penalty for all of Ohio's hazardous waste claims

in this case shall be a total of $125,000, and the maximum civil penalty for all of Ohio's water pollution claims in this case shall be $125,000. Thus, only one of the three alternative provisions set forth under the hazardous waste claims shall be entered as a judgment, and only one of the three alternative provisions set forth under the water pollution claims shall be entered as a judgment.

II. HAZARDOUS WASTE CLAIMS (Counts Three through Sixteen)—

2.1 If, after completition of the appeal, the ultimate decision holds that RCRA has waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under Ohio state hazardous waste laws, a Consent Judgment shall be entered as follows:

> DOE shall, not later than thirty (30) days after completition of the appeal, and in full settlement of disputed claims made by the State of Ohio against DOE under Counts Three through Sixteen, pay to the State of Ohio the sum of One Hundred Twenty-Five Thousand Dollars ($125,000) as civil penalties, by certified check or by wire transfer payable to the order of "Treasurer, State of Ohio", for deposit into the "Hazardous Waste Cleanup Fund".

2.2 If, after completition of the appeal, the ultimate decision holds that RCRA has not waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under Ohio state hazardous waste laws, but that RCRA has waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under RCRA, a Consent Judgment shall be entered as follows:

> DOE shall, not later than thirty (30) days after completition of the appeal, and in full settlement of

disputed claims made by the State of Ohio against DOE under Counts Three through Sixteen, arrange for payment to the United States Treasury of One Hundred Twenty-Five Thousand Dollars ($125,000) as civil penalties. Ohio's civil penalty claims under state law in these counts will be dismissed.

2.3 If, after completition of the appeal, the ultimate decision holds that RCRA has not waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under either Ohio state hazardous waste laws or under RCRA, the civil penalty claims contained in Counts Three through Sixteen shall be dismissed.

III. WATER POLLUTION CLAIMS (Counts Seventeen through Twenty-Six)—

3.1 If, after completition of the appeal, the ultimate decision holds that the CWA has waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under state water pollution control laws, a Consent Judgment shall be entered as follows:

DOE shall, not later than thirty (30) days after completition of the appeal, and in full settlement of disputed claims made by the State of Ohio against DOE under Counts Seventeen through Twenty-Six, pay to the State of Ohio the sum of One Hundred Twenty-Five Thousand Dollars ($125,000) as civil penalties, by certified check or by wire transfer payable to the order of "Treasurer, State of Ohio".

3.2 If, after completion of the appeal, the ultimate decision holds that the CWA has not waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under state water pollution control laws, but that the CWA has waived sovereign immunity to allow the State of Ohio to

bring suit against DOE for civil penalties claims imposed under the CWA, a Consent Judgment shall be entered as follows:

> DOE shall, not later than thirty (30) days after completition of the appeal, and in full settlement of disputed claims made by the State of Ohio against DOE under Counts Seventeen through Twenty-Six, arrange for payment to the United States Treasury of One Hundred Twenty-Five Thousand Dollars ($125,000) as civil penalties. Ohio's civil penalty claims under state law in these counts will be dismissed.

3.3 If, after completition of the appeal, the ultimate decision holds that the CWA has not waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under either Ohio state water pollution control laws or under the CWA, the civil penalty claims contained in Counts seventeen through twenty-six shall be dismissed.

IV. IMPLEMENTATION

After completion of the appeal, DOE and Ohio will file appropriate pleadings to implement this Stipulation. If the parties are unable to file such appropriate pleadings by agreement, either party may request the Court to enter judgment in accordance with this Stipulation.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 90-1341

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
PETITIONERS

v.

OHIO, ET AL.

ORDER ALLOWING CERTIORARI

Filed June 3, 1991

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. This case is consolidated with 90-1517, *Ohio, et al.* v. *United States Department of Energy, et al.* and a total of one hour is allotted for oral argument.

June 3, 1991

SUPREME COURT OF THE UNITED STATES

No. 90-1517

OHIO, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ORDER ALLOWING CERTIORARI

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June 3, 1991

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Nos. 90-1341 and 90-1517

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

STATE OF OHIO, ET AL., CROSS-PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the federal facilities provision of the Clean Water Act (CWA), § 313, 33 U.S.C. 1323, waives the sovereign immunity of the United States from assessment of civil penalties under state water pollution control laws.

2. Whether the citizen suit provision of the CWA, § 505, 33 U.S.C. 1365, waives the sovereign immunity of the United States from assessment of federal civil penalties for violations of the Clean Water Act.

3. Whether the federal facilities provision of the Resource Conservation and Recovery Act (RCRA), § 6001, 42 U.S.C. 6961, waives the sovereign immunity of the United States from assessment of civil penalties.

4. Whether the citizen suit provision of RCRA, § 7002, 42 U.S.C. 6972, waives the sovereign immunity of the United States from assessment of federal civil penalties for violations of RCRA.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Attorney General of the State of Ohio was a plaintiff in the district court and an appellee in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Introduction and summary of argument	12
Argument:	
I. Under well-settled principles governing waivers of sovereign immunity, the state cannot prevail in this case unless it can identify waivers of federal sovereign immunity from civil penalties that are clear and unambiguous	15
II. The CWA federal facilities provision does not waive federal sovereign immunity from assessment of civil penalties under Ohio Rev. Code § 6111.09	18
III. The CWA citizen suit provision does not waive federal sovereign immunity from assessment of CWA civil penalties	31
IV. The RCRA federal facilities provision does not waive federal sovereign immunity from assessment of civil penalties	34
V. The RCRA citizen suit provision does not waive federal sovereign immunity from assessment of RCRA civil penalties	40
Conclusion	44
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Alabama v. *Veterans Administration*, 648 F. Supp. 1208 (M.D. Ala. 1986)	34
America Well Works Co. v. *Layne & Bowler Co.*, 241 U.S. 257 (1916)	26

Cases—Continued: Page

Arcadia, Ohio v. *Ohio Power Co.*, 111 S. Ct. 415 (1990) 20
Block v. *North Dakota*, 461 U.S. 273 (1983) 16
California v. *Department of the Navy*, 845 F.2d 222 (9th Cir. 1988) 10-11, 29
California v. *Walters*, 751 F.2d 977 (9th Cir. 1984) 22, 24, 34, 35
EPA v. *California*, 426 U.S. 200 (1976) ..... *passim*
Gully v. *First Nat'l Bank*, 299 U.S. 109 (1936) 28
Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) 5, 6, 31, 33, 40
Hancock v. *Train*, 426 U.S. 167 (1976) 16, 17, 22, 23, 37, 38, 40
Jarecki v. *G.D. Searle & Co.*, 367 U.S. 303 (1961) .. 21
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 16
Library of Congress v. *Shaw*, 478 U.S. 310 (1986) 16
Maine v. *Department of the Navy*, 702 F. Supp. 322 (D. Me. 1988), appeal pending, No. 91-1064 (1st Cir.) 34
McClellan Ecological Seepage Situation (MESS) v. *Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986) 29, 34
Merrell Dow Pharmaceuticals, Inc. v. *Thompson*, 478 U.S. 808 (1986) 26, 27
Meyer v. *United States Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986) 34
Missouri Pac. R.R. v. *Ault*, 256 U.S. 554 (1921) 16
Mitzelfelt v. *Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990) 11, 22, 34
Puerto Rico v. *Shell Co.*, 302 U.S. 253 (1937) 27
Romero v. *International Terminal Operating Co.*, 358 U.S. 354 (1959) 26
Secretary of the Interior v. *California*, 464 U.S. 312 (1984) 40
Sierra Club v. *Lujan*, 931 F.2d 1421 (10th Cir. 1991) 31
Smith v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) 26
State v. *Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 438 N.E.2d 120 (1982) 27

Cases—Continued: Page

State v. *Howard*, 3 Ohio App. 3d 189, 444 N.E.2d 469 (1981) 27
United States v. *King*, 395 U.S. 1 (1969) 16
United States v. *Mitchell*, 445 U.S. 535 (1980) 16
United States v. *Press Publishing Co.*, 219 U.S. 1 (1911) 27
United States v. *Sherwood*, 312 U.S. 584 (1941) 16
United States v. *United Mine Workers*, 330 U.S. 258 (1947) 39
United States v. *Washington*, 872 F.2d 874 (9th Cir. 1989) 11, 34
Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 25

Constitution, Statutes and regulation:

U.S. Const. Art. III 25
Clean Air Act, 42 U.S.C. 7601 *et seq.* 7
§ 304(a), 42 U.S.C. 7604(a) 7
Clean Air Act Amendments of 1966, § 118(f), 42 U.S.C. 1857(f) (1976) 37
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, Tit. 1, § 116, 91 Stat. 711 (42 U.S.C. 7418(a) 7, 23
Clean Water Act, 33 U.S.C. 1251 *et seq.* ..... *passim*
§ 101(b), 33 U.S.C. 1251(b) 29
§ 301(a), 33 U.S.C. 1311(a) 2
§ 304, 33 U.S.C. 1314 2
§ 306, 33 U.S.C. 1316 2
§ 307, 33 U.S.C. 1317 2
§ 308, 33 U.S.C. 1318 36
§ 308(a), 33 U.S.C. 1318(a) 36
§ 309(a), 33 U.S.C. 1319(a) 3
§ 309(d), 33 U.S.C. 1319(d) 5, 25, 27, 32
§ 313, 33 U.S.C. 1323 (Supp. IV 1976) 10, 22, 24, 37
§ 313, 33 U.S.C. 1323 13
§ 313(a), 33 U.S.C. 1323(a) (Supp. IV 1976) ..... *passim*
§ 402, 33 U.S.C. 1342 2
§ 402(a), 33 U.S.C. 1342(a) 3
§ 402(b), 33 U.S.C. 1342(b) 3, 29
§ 402(b)(7), 33 U.S.C. 1342(b)(7) 3
§ 402(c), 33 U.S.C. 1342(c) 3

Statutes and regulation—Continued: Page

§ 402(d)(1), 33 U.S.C. 1342(d)(1) 3
§ 402(d)(2), 33 U.S.C. 1342(d)(2) 3
§ 402(k), 33 U.S.C. 1342(k) 3, 10
§ 502, 33 U.S.C. 1362 42
§ 502(5), 33 U.S.C. 1362(5) 5-6, 32
§ 505(a), 33 U.S.C. 1365(a) 2, 5, 14, 31, 1a, 3a
§ 505(f), 33 U.S.C. 1365(f) 5
Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* 9, 40
Federal Assimilative Crimes Act, 18 U.S.C. 13 27
Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 888 ..... 18, 32
Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 2, 90 Stat. 2825 ..... *passim*
§§ 1002, 42 U.S.C. 6901 *et seq.* 2, 6
§ 1004(15), 42 U.S.C. 6903(15) 8, 42
§ 3001, 42 U.S.C. 6921 6
§ 3004, 42 U.S.C. 6924 6
§ 3005, 42 U.S.C. 6925 6
§ 3005(c), 42 U.S.C. 6925(c) 6
§ 3006(b), 42 U.S.C. 6926(b) 6
§ 3006(c), 42 U.S.C. 6926(c) 7
§ 3006(e), 42 U.S.C. 6926(e) 7
§ 3008(a), 42 U.S.C. 6928(a) 7, 12, 41
§ 3008(g), 42 U.S.C. 6928(g) 8, 12, 39, 41
§ 3016, 42 U.S.C. 6937 44
§ 6001, 42 U.S.C. 6961 ..... *passim*
§ 7002, 42 U.S.C. 6972 11
§ 7002(a), 42 U.S.C. 6972(a) (1982) 2, 8, 15, 41, 43, 3a, 5a
Safe Drinking Water Act, 42 U.S.C. 300j *et seq.*:
42 U.S.C. 300j-6 7
42 U.S.C. 300j-8 7
Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, § 120, 42 U.S.C. 9620 40
18 U.S.C. 7 27
28 U.S.C. 1331 25

Statutes and regulation—Continued: Page

28 U.S.C. 2414 33
28 U.S.C. 1292(b) 9
31 U.S.C. 724a (Supp. II 1978) 33
Ohio Rev. Code Ann. (Anderson):
§ 3734.13 (1985 Ohio Laws 2295) 4, 8
§ 3734.13(C) 2, 8, 10, 6a
Ohio Rev. Code Ann. § 6111.09 (Supp. 1987) ..... *passim*
40 C.F.R. 123.22 (1985) 30

Miscellaneous:

A Legislative History of the Clean Water Act of 1977 (1978):
Vol. 3 ..... 23, 30
Vol. 4 23
58 Comp. Gen. 667 (1979) 34
118 Cong. Rec. 33,761 (1972) 30
122 Cong. Rec. (1976):
p. 21,429 37
p. 32,631 38
p. 32,599 38
132 Cong. Rec. 28,430 (1986) 40
137 Cong. Rec. H4887 (1991) 39
48 Fed. Reg. (1983):
p. 5918 3
p. 32,345 7
51 Fed. Reg. 4128 (1986) 7
H.R. 2194, 102d Cong., 1st Sess. (1991) 39
H.R. 3199, 95th Cong., 2d Sess. (1977) 23
H.R. 14496, 94th Cong., 2d Sess. (1976) 36, 38
H.R. Conf. Rep. No. 113, 98th Cong. 2d Sess. (1984) 43
H.R. Conf. Rep. No. 198, 98th Cong. 1st Sess. Pt. 1 (1983) 43
H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. (1977) 11, 23, 30
H.R. Rep. No. 370, 95th Cong., 1st Sess. (1973) 23
H.R. Rep. No. 962, 99th Cong., 2d Sess. (1986) 40
H.R. Rep. No. 1491, 94th Cong., 2d Sess. (1976) 36

Miscellaneous—Continued: Page

L. Duffy, Statement Before House Comm. on Armed Services (June 6, 1991) 39
S. 596, 102d Cong., 1st Sess. (1991) 39
S. 3622, 94th Cong., 2d Sess. (1976) 37
S. Rep. No. 284, 98th Cong., 1st Sess. (1983) 43
S. Rep. No. 988, 94th Cong., 2d Sess. (1978) 37

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1341

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

No. 90-1517

STATE OF OHIO, ET AL., CROSS-PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-27a) is reported at 904 F.2d 1058. The decision of the district court (Pet. App. 28a-44a) is reported at 689 F. Supp. 760.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a-48a) was entered on June 11, 1990. A petition for rehearing was denied on October 10, 1990. Pet. App. 45a-

46a. The petition in No. 90-1341 was filed on February 22, 1991. The cross-petition in No. 90-1517 was filed on March 26, 1991. This Court granted the petition and the cross-petition and consolidated the cases on June 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 313(a) and 505(a) of the Clean Water Act (CWA), 33 U.S.C. 1323(a), 1365(a), are reproduced at App., *infra*, 1a-3a. Sections 6001 and 7002(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6961, 6972, are reproduced at App., *infra*, 3a-6a. Section 3734.13(C) and 6111.09 of the Ohio Revised Code are reproduced at App., *infra*, 6a-7a.

STATEMENT

This case raises the question whether certain provisions of the CWA, 33 U.S.C. 1251 *et seq.*, and RCRA, 42 U.S.C. 6901 *et seq.*, waive federal sovereign immunity from civil penalties.

1. a. Section 301(a) of the CWA, 33 U.S.C. 1311(a), prohibits the discharge of pollutants into navigable waters of the United States except pursuant to a permit issued under Section 402 of the Act, 33 U.S.C. 1342. To implement Section 301(a)'s conditional prohibition, the EPA Administrator is directed to establish effluent limitations and standards of performance for "point sources" of pollution. CWA §§ 304, 306 and 307, 33 U.S.C. 1314, 1316, and 1317. Through the National Pollution Discharge Elimination System (NPDES), established pursuant to Section 402 of the CWA, these standards and limitations, together with certain possible limitations based on state law, are incorporated into individual NPDES discharge permits. See generally *EPA* v. *California*, 426 U.S. 200, 202-209 (1976). Once an NPDES permit is issued, "[c]ompliance with a permit * * * shall be deemed compliance * * * with" most of the require-

ments of the CWA. CWA § 402(k), 33 U.S.C. 1342(k); *EPA* v. *California*, 426 U.S. at 205 ("in short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under" the Act).

Although CWA Section 402(a) gives EPA authority to issue NPDES permits in the first instance, CWA Section 402(b) provides that a State may administer its own permit program in lieu of the federal program if EPA determines that the state program meets certain minimum standards.[1] Among those standards is the requirement that the state program must provide "adequate authority * * * [t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." CWA § 402(b)(7), 33 U.S.C. 1342(b)(7). When EPA approves a state program, the issuance of permits and the administration of the NPDES program become a state function. See CWA § 402(c), 33 U.S.C. 1342(c). The State, however, must still notify EPA of applications for and approvals of permits. CWA § 402(d)(1), 33 U.S.C. 1342(d)(1). After an approved state program has begun to function, EPA generally retains authority to object to the issuance of particular permits (CWA § 402(d)(2), 33 U.S.C. 1342(d)(2)), to monitor the state program to ensure that it continues to meet federal minimum standards (CWA § 402(c), 33 U.S.C. 1342(c)), and, after notification to the State, to enforce the terms of state-issued permits if the State has failed to institute enforcement actions of its own. CWA § 309(a), 33 U.S.C. 1319(a).

b. Two provisions in the CWA address aspects of federal amenability to suit. The State asserted in this litigation that each of those provisions constitutes an independent basis for claiming civil penalties against the federal government.

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[1] The respondent State of Ohio obtained such EPA approval on January 14, 1983. 48 Fed. Reg. 5918 (1983).

i. The federal facilities provision of the CWA, Section 313(a) 33 U.S.C. 1323(a), provides that federal facilities "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity." Section 313(a) then adds that the above sentence

> shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.[2]

Section 313(a) further provides, however, that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court."

According to the State, the above provision generally waives federal sovereign immunity from assessment of civil penalties under either the CWA itself or state water pollution statutes, provided that the civil penalties meet the requirement of the proviso—*i.e.*, that they "aris[e] under Federal law." Under Ohio Rev. Code Ann. § 6111.09 (Anderson Supp. 1987), "[a]ny person who violates [state water pollution regulations] shall pay a civil penalty of not more than ten thousand dollars per day of violation, to be paid into the state treasury to the credit of the general revenue fund."[3] The State asserts

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[2] Section 313(a) also adds that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law."

[3] All references to Ohio Rev. Code § 6111.09 and to the penalty provision of the state hazardous waste act, Ohio Rev. Code § 3734.13(C), are to those provisions as they were when this lawsuit was filed. See App., *infra*, 6a-7a. Although both provisions

that this civil penalty provision can be said to "arise under" Federal law, since it is part of the EPA-approved Ohio permit program. The State argues that the CWA federal facilities provision therefore waives federal sovereign immunity from assessment of civil penalties payable to the state treasury under Ohio Rev. Code § 6111.09.

ii. In addition to the federal facilities provision, the CWA's citizen suit provision, Section 505(a), 33 U.S.C. 1365(a), also addresses federal amenability to suit in the course of defining the broad right of citizens to sue any entity in violation of the CWA's standards. See generally *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). Under Section 505(a), "any citizen may commence a civil action * * * against any person (including * * * the United States)" to enforce an "effluent standard or limitation," which is defined by CWA Section 505(f), 33 U.S.C. 1365(f), to include an NPDES permit, whether issued under federal or state law. The citizen suit provision thus includes the federal government among those entities that can be defendants in CWA citizen suits. Section 505(a) further provides that district courts shall have jurisdiction in such citizen suits to require compliance with an NPDES permit and to apply "any appropriate civil penalties" under the CWA's civil penalties provision, Section 309(d), 33 U.S.C. 1319(d). Section 309(d) itself provides that "[a]ny person" who violates the permit provisions of the Act "shall be subject to a civil penalty not to exceed $25,000 per day for each violation." The term "person" in turn is defined in CWA Section 502(5), 33 U.S.C. 1362(5), to refer to a detailed list of entities that does not include the federal government.[4]

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have since been amended, the changes are not significant for purposes of this case.

[4] Section 502 provides:

> Except as otherwise specifically provided, when used in this chapter:

The State asserts that CWA civil penalties against the federal government are "appropriate" under the citizen suit provision. Like any federal civil penalties and unlike the state penalties sought under the CWA's federal facilities provision, such federal civil penalties must be deposited into the federal treasury. See *Gwaltney*, 484 U.S. at 53.

2. a. Originally enacted on October 21, 1976, RCRA, 42 U.S.C. 6901 *et seq.*, was the first federal effort to address the problem of hazardous waste. In Subtitle C, 42 U.S.C. 6921 *et seq.*, RCRA creates a "cradle-to-grave" management system intended to ensure that hazardous wastes are safely treated, stored, and disposed of. Section 3004 of RCRA requires EPA to promulgate regulations establishing performance standards applicable to owners and operators of new and existing treatment, storage, or disposal facilities to protect health and the environment. 42 U.S.C. 6924.

RCRA's permit system is administered in relevant respects much like that created by the CWA. Section 3005 of RCRA requires any facility that treats, stores, or disposes of hazardous waste to obtain a permit. 42 U.S.C. 6925. Section 3005(c) authorizes EPA or a State to issue such a permit only upon determining that the facility is in compliance with the standards promulgated by EPA under Section 3004. The statute provides that a State may issue and enforce hazardous waste management permits after it has applied to EPA to administer a hazardous waste program "in lieu of the Federal program" and EPA has authorized the program on the ground that it "is * * * equivalent to the Federal program" and provides "adequate enforcement" of RCRA's requirements. RCRA § 3006(b), 42 U.S.C. 6926(b). A

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* * * * *

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

State may obtain interim EPA authorization for its hazardous waste program if the program is found to be "substantially equivalent" to the federal program.[5] RCRA § 3006(c), 42 U.S.C. 6926(c). Even after an approved state program has begun to function, EPA generally retains authority to monitor the state program to ensure that it continues to meet federal minimum standards (RCRA § 3006(e), 42 U.S.C. 6926(e)), and to enforce the terms of state-issued permits after notifying the State if the State has failed to institute enforcement actions of its own. RCRA § 3008(a), 42 U.S.C. 6928(a).

b. Two provisions in RCRA address aspects of federal amenability to suit for violation of hazardous waste regulations. As with the CWA, the State has asserted in this litigation that each of the provisions constitutes an independent basis for claiming civil penalties against the federal government.[6]

i. The federal facilities provision of RCRA, Section 6001, 42 U.S.C. 6961, contains somewhat different language from the corresponding CWA provision. RCRA Section 6001 provides that facilities operated by the federal government "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provision for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements."

The State asserts that this provision simply waives federal sovereign immunity from assessment of civil pen-

[5] Ohio received interim authorization for its program on July 15, 1983. 48 Fed. Reg. 32,345 (1983). However, EPA withdrew that authorization on January 31, 1986. 51 Fed. Reg. 4128 (1986).

[6] Provisions that correspond to the citizen suit and federal facilities provisions of the CWA and RCRA can be found in the Safe Drinking Water Act, 42 U.S.C. 300j-8 (citizen suit), 42 U.S.C. 300j-6 (federal facilities), and the Clean Air Act, 42 U.S.C. 7604(a) (citizen suit), 42 U.S.C. 7418(a) (federal facilities).

alties for hazardous waste violations, with no requirement that such civil penalties must "aris[e] under Federal law," as in the CWA. Ohio Rev. Code § 3734.13(C) (1985 Ohio Laws 2295) provides that the state attorney general may bring an action for any violation of the state hazardous waste statutes and that in such an action "[t]he court may impose * * * a civil penalty of not more than ten thousand dollars for each day of each violation. * * * Moneys resulting from civil penalties imposed under [this provision] shall be paid into the hazardous waste clean-up fund" created elsewhere in the statute. Therefore, the State argues, the RCRA federal facilities provision includes a waiver of federal sovereign immunity from assessment of civil penalties payable to the state hazardous waste clean-up fund under Ohio Rev. Code § 3734.13.

ii. RCRA's citizen suit and civil penalties provision are very similar to the corresponding CWA provisions. Under RCRA's citizen suit provision, Section 7002(a), 42 U.S.C. 6972(a), "any person may commence a civil action * * * against any person (including * * * the United States * * *)" to enforce a "permit, standard, regulation, condition, requirement, prohibition, or order" under RCRA. Section 7002(a) further provides that district courts shall have jurisdiction in such citizen suits to require compliance with RCRA and to apply "any appropriate civil penalties" under RCRA's civil penalties provision, Section 3008(g), 42 U.S.C. 6928(g). Section 3008(g) itself provides that "[a]ny person who violates any requirement of [relevant RCRA provisions] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." The term "person" is defined in RCRA Section 1004(15), 42 U.S.C. 6903(15), to refer to a list of entities that does not include the federal government.[7]

[7] Section 1004(15) provides:

> The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

As with the corresponding CWA citizen suit provision, the State asserts that RCRA civil penalties against the federal government are "appropriate" under the above RCRA provision.

3. In this case, the State of Ohio filed suit in federal district court against the Department of Energy, the Secretary of Energy, and the Department of Energy's former private contractor, alleging that defendants had improperly treated, stored, and disposed of hazardous wastes and had improperly discharged pollutants and contaminants into waters at the Department of Energy's uranium processing plant in Fernald, Ohio. The State, relying on RCRA, the CWA, and state environmental laws, sought, *inter alia*, injunctive relief and civil penalties against the Department of Energy under both state and federal law. J.A. 3-43.

In the district court, the United States moved to dismiss all claims for civil penalties as barred by the federal government's sovereign immunity. The court denied the motion, holding that federal sovereign immunity was w[illegible]d under RCRA and the CWA as to both federal and state penalties. Pet. App. 28a-44a. The parties subsequently entered into a consent decree settling the injuctive relief claims. J.A. 63-86.[8] As part of the overall settlement, the parties stipulated to the amount of civil penalties to be paid—a potential total of $125,000 for water pollution violations and $125,000 for hazardous waste violation—if the United States does not prevail on appeal. J.A. 88-89.

The district court certified (C.A. App. 105) an interlocutory appeal of the civil penalties issue under 28 U.S.C. 1292(b), and the Sixth Circuit granted the unopposed petition of the United States for permission to appeal. C.A. App. 157.

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[8] The State's complaint also contained two claims based on the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* Pursuant to the consent decree, one of those claims was dismissed and the other was stayed. J.A. 78.

4. A divided panel of the Sixth Circuit affirmed the district court in part, holding that the federal facilities provision of the CWA does waive federal sovereign immunity from civil penalties assessed under Ohio Rev. Code § 6111.09 and payable to the state treasury, that the federal facilities provision of RCRA does not waive federal sovereign immunity from civil penalties under Ohio Rev. Code § 3734.13(C), and that the citizen suit provision of RCRA does waive federal sovereign immunity from civil penalties payable to the federal treasury under RCRA's own civil penalties provision. The court did not reach the State's contention that the citizen suit provision of the CWA, like the citizen suit provision of RCRA, waives federal sovereign immunity from civil penalties under federal law. See Pet. 11 n.6.

a. With respect to the CWA, the court found that sovereign immunity was waived by Section 313 for penalties "arising under Federal law." Pet. App. 4a-6a. The court then considered whether immunity for civil penalties under Ohio Rev. Code § 6111.09 was waived and held that immunity from such state civil penalties was waived because they "arise under" federal law. The court reasoned (Pet. App. 7a):

> Once a state water pollution law is approved, compliance with the state law *is* compliance with the Clean Water Act. 33 U.S.C. § 1342(k). Thus, under the terms of the Clean Water Act, a qualifying state water pollution law, including its civil penalties, arises under federal law.

Judge Guy dissented as to the holdings concerning both the CWA and RCRA. Pet. App. 16a-27a. With respect to the CWA, he agreed with the majority (Pet. App. 19a-20a) that the federal facilities provision of the CWA, Section 313(a), waives sovereign immunity for civil penalties arising under federal—but not state—law. However, in determining which civil penalties arise under federal law, Judge Guy agreed with the Ninth Circuit's decision in *California* v. *Department of the Navy*, 845

F.2d 222 (1988), that a State's EPA-approved permit program and penalties assessed thereunder do not "aris[e] under federal law." Pet. App. 22a-24a. He based this conclusion on the explicit statutory recognition that a State "administer[s] *its own* permit program * * * upon approval of the program by [the] EPA." He also relied on statements in the statute's legislative history that state permit programs "function[] in lieu of the Federal program." Pet. App. 23a (quoting H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977)).

b. With respect to RCRA, the court held that any waiver of sovereign immunity from civil penalties in Section 6001 "is not stated clearly enough to be recognized." Pet. App. 10a. The court thus unanimously rejected the district court's conclusion that the federal facilities provision waives the federal government's sovereign immunity from state or federal civil penalties. Pet. App. 9a-12a, 17a n.1 (Guy, J., dissenting). The court of appeals reasoned that the RCRA federal facilities provision differs from the analogous CWA provision in ways that make clear that no waiver as to civil penalties was intended in RCRA. Pet. App. 11a. In addition, the court observed that although Section 6001 explicitly discusses injunctive relief twice, it never mentions monetary relief or civil penalties. Pet. App. 11a-12a. Accord *United States* v. *Washington*, 872 F.2d 874 (9th Cir. 1989); *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990).

The majority did, however, find that RCRA's citizen suit provision, $ection 7002, 42 U.S.C. 6972, constituted a waiver of federal immunity from civil penalties assessed under RCRA's own civil penalties provision. Observing that RCRA's citizen suit provision generally authorizes suits against the United States (Pet. App. 15a), the court concluded that the "fairest reading" of the provision is that Congress intended to subject the United States to the application of "appropriate" civil penalties. In addition, the majority stated, RCRA's legis-

lative history demonstrates that Congress intended to subject the United States to civil penalties in citizen suits. Pet. App. 15a-16a.

Judge Guy disagreed with the majority's conclusion that the citizen suit provision of RCRA authorizes civil penalties against the United States. Judge Guy found that, under the express language of the provision, "judicial authority to impose civil penalties in response to RCRA citizen suits is limited to sanctions permitted under 42 U.S.C. §§ 6928(a) and (g)." Pet. App. 25a. Because the United States is excluded from RCRA's general definition of "person[s]" against whom civil penalties may be levied under those Sections, the reference in the citizen suit provision to those Sections precludes assessment of civil penalties against the United States. Pet. App. 25a-26a. He also noted that the exclusion of the United States from those entities subject to civil penalties is "entirely logical" because the penalties assessed under RCRA are payable "to the United States." Pet. App. 26a n.4 (quoting 42 U.S.C. 6928(g)). He concluded that RCRA waives sovereign immunity only to the extent that it permits States to seek declaratory and injunctive relief. Pet. App. 26a.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The issue in this case is whether certain provisions of the CWA and RCRA waive federal sovereign immunity from assessment of civil penalties for past violations of state or federal clean water and hazardous waste regulatory programs. It is undisputed that the various provisions at issue do permit some suits to be brought—and some remedies to be imposed—against the federal government that would otherwise be barred by federal sovereign immunity. The line that the statutes draw, however, is the line between prospective and retrospective relief. That is, they permit suits to be brought against the federal government to enjoin future violations, and they permit a court to assess sanctions for

failure to comply with such injunctions. But they do not waive federal sovereign immunity from civil penalties imposed to penalize past violations of clean water or hazardous waste disposal regulations.

The congressional decision to permit prospective relief but not civil penalties is embodied in the plain language of the statutes. Insofar as any doubt may remain, ambiguities must be resolved against finding a waiver of sovereign immunity. This Court's decisions make clear that such a waiver is not to be implied; it requires evidence that Congress has stated its intention to waive immunity in clear and unmistakable terms. When Congress enacted the provisions at issue in this case, it legislated against the background of this well-settled "clear statement" rule. As shown both by alternative versions of the CWA federal facilities provision that were rejected and recent bills that would amend RCRA's federal facilities provision, Congress knows how to fashion language to make clear its intent to waive sovereign immunity from civil penalties. The absence of any such language in the provisions at issue here is thus particularly telling, and application of the "clear statement" rule is entirely appropriate.

2. Neither of the CWA provisions at issue constitutes a waiver of federal sovereign immunity from the civil penalties sought in this case. The federal facilities provision, CWA § 313, 33 U.S.C. 1323, does not expressly waive sovereign immunity as to civil penalties. The only language that is asserted to waive sovereign immunity as to civil penalties—the term "sanctions"—does appear in the statute, but in each place it appears it is used in the phrase "process and sanctions" to refer only to injunctions and such sanctions as are necessary to enforce compliance with them.

Furthermore, Congress made particularly clear that civil penalties such as those sought here by the State pursuant to Ohio Rev. Code § 6111.09 could not be assessed against the federal government, by including in Section 313(a) the proviso that "the United States shall

be liable only for those civil penalties arising under Federal law." Ohio Rev. Code § 6111.09 was enacted by the Ohio legislature. The incidents of such penalties, including the circumstances under which they may be assessed, the machinery for assessing them, and the amounts of such penalties, are all governed entirely by state law; the state statute applies to potential defendants *ex proprio vigore*. Although the State claims that the fact that EPA approved the state water pollution permit scheme is significant, that fact alone does not convert civil penalties governed entirely by state law into penalties "arising under Federal law," under the well-settled legal meaning of that phrase.

Nor does the CWA citizen suit provision, § 505(a), 33 U.S.C. 1365(a), provide an independent basis for assessment of federal civil penalties against federal agencies. That provision unmistakably authorizes citizen suits against federal agencies, as well as non-federal entities, in specified circumstances. It also authorizes district courts in such citizen suits to assess "appropriate" civil penalties, as provided in the CWA civil penalties provision. The latter provision, however, authorizes civil penalties only against "persons," a term defined in the statute as comprising a detailed list of entities that does not include the federal government. It is thus not "appropriate," in the language of the CWA citizen suit provision, to assess civil penalties against the federal government.

3. The RCRA federal facilities provision, § 6001, 42 U.S.C. 6961, is even less conducive than the corresponding CWA provision to interpretation as a waiver of federal sovereign immunity from civil penalties. The State's argument with respect to the CWA provision hinges on the statutory language subjecting federal agencies to "process and sanctions." Yet the term "sanctions," as used in the RCRA provision, could not refer to civil penalties, and the State thus far in this litigation has not contended otherwise. Instead, the State asserts that in

the RCRA provision, Congress subjected federal agencies to civil penalties through use of the general phrase "all * * * requirements." That phrase, however, is most naturally read to refer to permit requirements and similar means of applying RCRA's general standards to particular facilities, not penal measures. The history of the statute, which shows that the phrase "all * * * requirements" was intended to respond to decisions of this Court holding that federal facilities need not comply with state permit requirements, supports that conclusion.

Finally, the RCRA citizen suit provision, § 7002(a), 42 U.S.C. 6972(a), whose language in relevant respects is quite similar to that of the corresponding CWA provision, should not be construed to waive federal sovereign immunity from civil penalties. Like the corresponding CWA provision, it renders federal agencies amenable to citizen suits and generally permits courts to assess civil penalties where "appropriate" under the RCRA civil penalties provision. The citizen suit provision does not, however, contradict the effect of the civil penalties provision's exclusion of the federal government from the "person[s]" subject to civil penalties under RCRA.

ARGUMENT

I. UNDER WELL-SETTLED PRINCIPLES GOVERNING WAIVERS OF SOVEREIGN IMMUNITY, THE STATE CANNOT PREVAIL IN THIS CASE UNLESS IT CAN IDENTIFY WAIVERS OF FEDERAL SOVEREIGN IMMUNITY FROM CIVIL PENALTIES THAT ARE CLEAR AND UNAMBIGUOUS

The various statutory provisions at issue in this case speak for themselves, and none of them contains language indicating a congressional intent to waive federal sovereign immunity from either federal or state civil penalties. This is especially so in light of the well-settled principles that waivers of sovereign immunity must be clear and unambiguous and must be construed strictly in favor of the sovereign.

Under a long line of decisions by this Court, a waiver of sovereign immunity by the federal government must be unequivocally expressed and may not be implied, assumed, or based on speculation or ambiguity. *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *King*, 395 U.S. 1, 4 (1969). Any asserted waiver of the United States' immunity to suit must be construed "strictly in favor of the sovereign" and "not enlarge[d] * * * 'beyond what the language requires.'" *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (citation omitted); accord *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). As in other contexts, asserted waivers of sovereign immunity in federal environmental statutes must be "clear and unambiguous." *Hancock* v. *Train*, 426 U.S. 167, 179 (1976); *EPA* v. *California*, 426 U.S. at 211.

The foregoing principles have particular force in two circumstances, both of which are present in this case. First, where the asserted waiver of sovereign immunity affects the federal fisc, see *Lehman* v. *Nakshian*, 453 U.S. 156, 161 n. 8 (1981), and especially where the asserted waiver would subject the federal government to penal laws, courts require a particularly clear statement in order to find that a statute phrased in otherwise general terms waives federal sovereign immunity. For example, in *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554 (1921), the Court held that a statute waiving sovereign immunity in terms similar to those in the CWA and RCRA was insufficient to waive federal immunity to fines and penalties. The statute at issue provided that rail carriers "while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law." 256 U.S. at 558. The phrase "all laws and liabilities" is, if anything, broader than the language asserted by the State to waive sovereign immunity from civil penalties in this case. Nonetheless, Justice Brandeis, writing for a unanimous

Court, noted that "the element of punishment clearly predominates" with respect to the penalties sought (256 U.S. at 565) and consequently held that—notwithstanding the general terms used in the statute—"Congress has not given its consent that suits of this character be brought against the United States." *Ibid.*

In addition, as this Court observed in *Hancock* v. *Train*, 426 U.S. 167, 179 (1976), "[p]articular deference should be accorded" the rule requiring a waiver of sovereign immunity to be clear and unambiguous where "the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign." See also *id.* at 178-179 (noting "fundamental importance of the principles shielding federal installations and activities from regulation by the States"). Insofar as the State here seeks civil penalties to be determined in accordance with state law and to be paid into the state treasury, especially rigorous application of the clear statement standard to the asserted waiver of sovereign immunity from civil penalties is therefore required.

The principles requiring narrow construction of waivers of sovereign immunity have changed little over the years. In addition, all but one of the statutory provisions at issue in this case were enacted shortly after this Court's decisions in *Hancock* v. *Train* and *EPA* v. *California*—decisions that expressly rested on application of the established clear statement rule concerning asserted waivers of federal sovereign immunity, see *Hancock* v. *Train*, 426 U.S. at 178-180; *EPA* v. *California*, 426 U.S. at 211—and with undoubted congressional consideration of those decisions.[9] Congress thus enacted these provisions

[9] The two RCRA provisions at issue were enacted in 1976. Since that time, the federal facilities provision has changed little, but the citizen suit provision was amended in 1984. See pp. 43-44, *infra*. The CWA federal facilities provision was modified, partially in response to *EPA* v. *California*, in 1977. See pp. 22-24,

with full knowledge of the clear statement rule, and Congress's failure to include any language that approaches a clear and unambiguous statement waiving sovereign immunity from civil penalties establishes that Congress intended no such waiver.

II. THE CWA FEDERAL FACILITIES PROVISION DOES NOT WAIVE FEDERAL SOVEREIGN IMMUNITY FROM ASSESSMENT OF CIVIL PENALTIES UNDER OHIO REV. CODE § 6111.09

The court of appeals made two distinct errors in concluding that the federal facilities provision of the CWA, § 313(a), 33 U.S.C. 1323(a), waives federal sovereign imunity from state-law civil penalties. First, the court mistakenly held that the federal facilities provision, which concededly waives federal sovereign immunity from injunctive relief and sanctions to enforce compliance with such injunctions, supplies a sufficiently clear waiver of federal sovereign immunity from civil penalties. Pet. App. 4a-6a. Second, the court compounded its error by holding that "practically speaking, actions under a qualifying state water pollution law arise under federal law" (Pet. App. 7a) and therefore satisfy the "arising under Federal law" proviso contained in the CWA federal facilities provision.

1. The language of the CWA federal facilities provision does not waive the federal government's sovereign immunity from civil penalties. The first sentence of Section 313(a) provides, in relevant part:

> Each department, agency, or instrumentality * * * of the Federal Government * * * and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal * * * requirements, administrative authority, and process and sanctions respecting the

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infra. The language upon which the State relies in the CWA citizen suit provision, however, dates from 1972. See Pub. L. No. 92-500, § 2, 86 Stat. 888.

> control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity * * *.

33 U.S.C. 1323(a). This sentence refers to the following distinct types of regulation to which federal facilities are subject: "all * * * requirements, administrative authority, and process and sanctions."

a. The State argued below that the above sentence is the operative waiver of sovereign immunity from civil penalties. In particular, the State argued that this sentence waives federal sovereign immunity from a number of different items, among which are "sanctions." Since civil penalties are "sanctions," the State concluded, the language in the above provision subjecting the federal government to "sanctions" has the effect of waiving sovereign immunity from civil penalties. See Ohio C.A. Br. 18-25.

The State's reading of the statute is erroneous, for the statute does not waive federal sovereign immunity as to a distinct category consisting of all types of "sanctions." Indeed, the language of the sentence does not bear the meaning that the State seeks to impose on it. To be sure, the language does embody a list of items as to which sovereign immunity is to be waived. That list, however, is separated by commas and the term "and" in such a way that "sanctions" *cannot* be read as a separate and coordinate item on the list. Instead, by placing the word "and" before the term "process"—"all * * * requirements, administrative authority, *and* process and sanctions" (emphasis added)—Congress made clear that there were three, not four, items on the list, and that "sanctions" was linked to "process" as a unitary expression.[10]

[10] The conclusion that the term "sanctions" in Section 313(a) refers only to penalties for assuring compliance with injunctive relief follows also from the fact that, when Congress added the term to the CWA in 1977, it had before it as a model the corresponding RCRA provision that had been enacted the prior year. The RCRA provision, RCRA § 6001, 42 U.S.C. 6961, employs the phrase "process or sanction," a phrase almost identical to the

Under the State's interpretation, the use of the term "and" before "process" is not only surplusage; it is in irresolvable conflict with ordinary English grammar. Cf. *Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415, 419 (1990).

The structure of the statute bears out the congressional intent to authorize "sanctions" against the federal government only in connection with "process," *i.e.*, as a means of ensuring compliance with injunctive relief (or other court order). The second sentence provides, in relevant part:

> The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirements, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local court or in any other manner.

This sentence in orderly fashion elaborates on each of the categories listed in the first sentence. With respect to the first category, it makes clear that "requirements" refers to "any requirement whether substantive or procedural." With respect to the second category, it provides that "administrative authority" includes such authority exercised by any level of government. Finally, with respect to the third category, it states that "process and sanctions" refers to "any process and sanction, whether enforced in Federal, State, or local courts or in any other manner." Thus, the second sentence reinforces the conclusion that there are three—not four—items in the list, even going so far as to designate them (A), (B), and (C).

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phrase "process and sanctions" in the CWA. As we argue below (see p. 35, *infra*), that phrase as used in RCRA refers only to penalties imposed to secure compliance with injunctive relief; it could not sensibly refer to civil penalties.

With respect to the third category, the statute again uses the term "process and sanction" as a unitary expression; this time, the addition of the word "any" and the use of the singular form "sanction" emphasizes that Congress intended here to subject the federal government to a single type of legal authority—process and sanction. Although the sentence goes on to provide that the type of court and manner of enforcement does not affect the waiver, neither here nor elsewhere in the text of the provision is there a reference to "sanctions" generally, apart from the unitary expression "process and sanction." [11]

b. While the State read the list of items as to which sovereign immunity was to be waived as a list of four items,[12] the court of appeals read it to include only one item, followed by several examples. Thus, the court stated that the first sentence of the statute "subjects the Department of Energy to 'any requirement,' including 'sanctions.'" Pet. App. 4a.[13] That reading departs from the statutory text even more than the State's interpretation. For, while the State at least recognizes that the statute contains a list of items as to which sovereign immunity is waived, the court of appeals, with no support at all from the statutory text, subordinates all the remaining items on the list to the first.

In any event, the phrase "all * * * requirements" is most naturally read to refer to regulations that govern

[11] This Court has remarked that the rule "that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

[12] On brief in the court of appeals, the State relied entirely on the "process and sanctions" clause of Section 313, not the "requirements" clause. Ohio C.A. Br. 18-25.

[13] The court later similarly asserted that the term "all requirements" includes "process and sanctions." Pet. App. 6a. Oddly, the court found that the same language—"all * * * requirements"—in the corresponding RCRA provision does not waive federal immunity from civil penalties. See Pet. App. 9a-12a.

the primary conduct of those who operate federal facilities, not to civil or criminal penalties or punishments to be imposed when the federal facilities cannot or do not comply with those requirements.[14] Obviously, the payment of penalties is not an optional form of compliance with the statute's "requirements." (Indeed, if it were, such payments would presumably also bar injunctive relief against non-compliance with the statute's "requirements.") The statute's purpose and intended effect are to improve the environment, not to produce revenue.

This interpretation is in full accord with the history of the federal facilities provision. In *EPA* v. *California*, 426 U.S. at 227, the issue was whether the version of the CWA then in force required federal facilities to obtain state permits and comply with their requirements.[15] The Court held that, although the provision indeed subjected federal facilities to "substantive" requirements limiting emission of pollutants, the provision did not contain clear and unambiguous language subjecting those agencies to the "procedural" requirement that they obtain state permits before they be permitted to discharge wastes.[16]

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[14] See *Mitzelfelt* v. *Department of Air Force*, 903 F.2d at 1295 (interpreting RCRA); *California* v. *Walters*, 751 F.2d 977, 978 (9th Cir. 1984) (same).

[15] In the companion case of *Hancock* v. *Train*, 426 U.S. 167 (1976), the Court addressed similar issues with respect to the Clean Air Act.

[16] Prior to the 1977 amendments, the federal facilities provision provided in relevant part:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government * * * shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

33 U.S.C. 1323 (1976).

In the course of generally revising the statute in 1977, Congress amended the federal facilities provision in response to *EPA* v. *California*. The legislative history of that amendment is sparse. As originally passed by the Senate, the bill altered the provision to provide that federal facilities "be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief)." [17] 4 *Leg. Hist.* 609. The Conference Committee substituted the language that ultimately was enacted for that of the Senate bill, reporting that its provision "is essentially the same as the Senate amendment revised to conform with a comparable provision in the Clean Air Act." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977), *reprinted in* 3 *Leg. Hist.* 277. Nonetheless, the Conference Committee did not adopt the Clean Air Act language intact; the "arising under Federal law" proviso was not in the corresponding Clean Air Act amendment. See Pub. L. No. 95-95, Tit. I, § 116, 91 Stat. 711, codified at 42 U.S.C. 7418(a).

The 1977 amendment made two kinds of changes. First, Congress directly addressed the holding of *EPA* v. *California* concerning the only issue in that case—state permit requirements. Congress did so by adding the term "all" (cf. *Hancock* v. *Train*, 426 U.S. at 182), as well as language making clear that the waiver extended "to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirements respecting permits and any other requirement whatsoever)." Cf. *Hancock* v. *Train*, 426 U.S. at 183. In thus clarifying the scope of the term "requirements,"

[17] The House bill contained no comparable amendment. See H.R. 3199, 95th Cong., 2d Sess. (1977), H.R. Rep. No. 370, 95th Cong., 1st Sess. (1977), *reprinted in* 4 *Legislative History of the Clean Water Act of 1977*, at 555-632 (1978) [hereinafter *Leg. Hist.*].

Congress certainly intended to render the result in *EPA* v. *California* obsolete. There is no reason, however, to believe that, in modifying the language concerning "requirements," Congress intended to address any issue concerning remedies generally, or civil (or criminal) penalties in particular.[18]

Second, Congress broadened the waiver in two other respects subjecting federal facilities to federal and state "administrative authority" and "process and sanctions." The addition of "administrative authority" makes clear that federal facilities are not only subject to state permit requirements, but also to incidental and related administrative requirements of state agencies. More to the point for present purposes, subjecting federal facilities to permit requirements of all sorts raised the question of how the limitations in those permits were to be enforced. Congress answered that question by providing for prospective enforcement through federal and state injunctive relief and sanctions to enforce such relief—"process and sanctions." There is nothing in this language to suggest that Congress intended to take the dramatic further step of subjecting the federal government generally to civil—and perhaps criminal—penalties. Cf. *California* v. *Walters*, 751 F.2d 977 (9th Cir. 1984).

2. Even if Section 313 had included a general waiver of federal immunity from civil penalties, any assessment

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[18] The Senate Committee report addressing the original language of the Senate bill, explained that "all Federal facilities must comply with all substantive and procedural requirements of Federal, State, or local water pollution control laws" and that federal facilities are subject "to any Federal, State, and local requirement." 4 *Leg. Hist.* 700. Nothing in this report, which in any event was not addressed to the language in the bill as enacted, suggests that the Senate intended to modify the law as to anything other than substantive requirements—*i.e.*, limitations on discharge of pollutants—and procedural requirements—*i.e.*, reporting and permit requirements—as understood by this Court in *EPA* v. *California*. There is no mention of penal measures, such as civil or criminal penalties.

of civil penalties against the federal government under that Section would have to comply with its express proviso that "the United States shall be liable only for those civil penalties arising under Federal law."[19] In this case, the State of Ohio relied on a state statute, Ohio Rev. Code § 6111.09 (Anderson Supp. 1987), as authority for imposition of civil penalties on the United States payable to the state treasury. Because civil penalties assessed under Ohio Rev. Code § 6111.09 do not in any sense arise under federal law, such penalties cannot be assessed against a federal agency.[20]

In adding the proviso to Section 313(a) that the United States is subject only to civil penalties "arising under Federal law," Congress chose language with a well-established legal meaning. Most notably, that language is familiar in the jurisprudence surrounding the general statutory grant of jurisdiction to the district courts over cases "arising under the * * * laws * * * of the United States." 28 U.S.C. 1331. Two formulations have developed to construe that statutory language.[21] First, as

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[19] If state civil penalties are barred by the proviso, the question remains whether the federal facilities provision waives federal sovereign immunity from federal civil penalties assessed pursuant to the CWA's own civil penalties provision, § 309(d), 33 U.S.C. 1319(d). As we point out below, the CWA does not include the United States as a "person" against whom such penalties may generally be assessed. See p. 32, *infra*. Furthermore, as discussed below, nothing in the CWA's citizen suit provision alters that conclusion. See pp. 31-32, *infra*.

[20] The court of appeals relied on the proviso's apparent presupposition that some *other* language in the statute waives sovereign immunity from civil penalties in holding that the "process and sanctions" language accomplishes such a waiver. Pet. App. 6a. Yet the proviso is at most a limitation on a waiver and not a waiver itself. As such, the proviso could not provide the kind of clear and unambiguous language that is otherwise absent from Section 313(a).

[21] As this Court has made clear, the same terms in Article III of the Constitution are given a substantially broader meaning. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 494-

this Court has stated, "[a] suit arises under the law that creates the cause of action." *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). Under the same principles, a remedy arises under the law that creates the entitlement to the remedy and the standards governing its incidence. Second, *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921), applied a somewhat looser formulation, holding that "where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim * * * rests upon a reasonable foundation," the case arises under federal law. See generally *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, 478 U.S. 804, 808 (1986).

Under either formulation, civil penalties assessed under Ohio Rev. Code § 6111.09 arise under state, not federal, law. The Ohio legislature, not the United States Congress, enacted Ohio Rev. Code § 6111.09. That statute—and not any provision of federal law—determines the circumstances under which the penalties are to be assessed, identifies to whom the penalties are to be paid, and sets the amount of the penalty. The Ohio statute would apply *ex proprio vigore* to govern penalties for discharges of pollutants within the State, regardless of the provisions of the CWA. Finally, in assessing a civil penalty under Ohio law, a court need not construe or apply any provision of federal law.[22]

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495 (1983); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). There is no reason to believe that Congress intended to refer to the constitutional meaning of those words when it added the proviso to Section 313(a).

[22] The State's own jurisdictional allegations in this case buttress the conclusion that the state civil penalties sought do not arise under federal law. For example, the complaint sought an order that the United States shall "pursuant to Ohio Revised Code Section 6111.09 * * * pay into the [Ohio] treasury a civil penalty for each violation of Ohio Revised Code Chapter 6111." J.A. 42. Moreover, the section of the complaint entitled "Jurisdiction"

To be sure, Ohio has apparently chosen to borrow federal standards to govern some issues that arise in assessing civil penalties under Section 6111.09. See, *e.g.*, *State* v. *Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 438 N.E.2d 120 (1982) (using EPA's civil penalty policy to decide upon size of civil penalty under state law); *State* v. *Howard*, 3 Ohio App. 3d 189, 444 N.E.2d 469 (1981) (same). A federal court applying Section 6111.09 would thus naturally refer to federal law—as adopted by Ohio law—in some circumstances.[23] But the fact that Ohio has chosen to refer to federal law to resolve some state-law issues does not transform those state-law issues into federal questions, much less transform the civil penalty remedy of Section 6111.09 into one arising under federal law.[23] See *Merrell Dow Pharmaceuticals*, 478 U.S. at 813 & n.11. Moreover, many issues would certainly be resolved in substantially different ways under state or federal law. Perhaps the most obvious example is that the maximum federal penalty permitted under CWA Section 309(d), 33 U.S.C. 1319(d), is $25,000 per day for each violation; the maximum penalty under Ohio Rev. Code § 6111.09 is $10,000.

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alleged that "[t]he Court has pendent jurisdiction over the claims asserted under the laws of the State of Ohio." J.A. 5. See also Ohio C.A. Br. 26 (Water pollution counts in the complaint "contain pendent state claims for civil penalties under Ohio Revised Code Section 6111.09."). By invoking pendent jurisdiction for its state-law penalty claims, the State indicated its belief that there may have been no independent basis for federal jurisdiction over such claims—*i.e.*, unlike the claims for federal civil penalties, they do not arise under federal law.

[23] Similarly, the Federal Assimilative Crimes Act, 18 U.S.C. 13, adopts state criminal law for certain crimes committed within the special maritime and territorial jurisdiction of the United States, see 18 U.S.C. 7. As this Court held in *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 266 (1937), "[p]rosecutions under [the Act] are not to enforce the laws of the state, territory or district, but to enforce the federal law, the details of which, instead of being recited, are adopted by reference." Accord *United States* v. *Press Publishing Co.*, 219 U.S. 1, 9-10 (1911).

In reaching its conclusion that civil penalties under Ohio Rev. Code § 6111.09 "arise under" federal law, the court of appeals relied heavily on the fact that state permit programs must be reviewed and approved by EPA in accordance with federal minimum standards before they are allowed to supplant the EPA permit program. Pet. App. 6a-8a. But, just as state reference to certain aspects of federal law does not convert state-law issues into federal ones, federal approval of the state civil penalty scheme does not convert civil penalties assessed under that scheme into penalties that arise under federal law. Congress, for example, could rescind or modify federal approval of the state scheme, but it could not amend any provision of the state scheme; that is the province of the state legislature.

This Court's decision in *Gully* v. *First Nat'l Bank*, 299 U.S. 109 (1936), establishes that mere federal approval of a state law does not transform cases arising under that law into cases arising under federal law. In *Gully*, a state tax collector sued to collect state taxes on the stock of a national bank. The State, however, had authority to collect such taxes only if authorized to do so by a federal statute. *Id.* at 112. This Court, in a unanimous opinion written by Justice Cardozo, held that the suit arose under state, not federal, law. Because "the right to be established [was] one created by the State," it was "unimportant that federal consent [was] the source of state authority." *Id.* at 116.

The Court's conclusion in *Gully* applies *a fortiori* to this case. The right to civil penalties under Ohio Rev. Code § 6111.09, like the right to collect the tax at issue in *Gully*, is created by state law and applies *ex proprio vigore*. The conclusion therefore follows that the right to civil penalties arises under state, not federal, law. The only significant difference between the cases is that in *Gully* the state statute could not be enforced unless authorized by federal law, whereas in this case there is no

doubt that the Ohio water pollution regulatory program, including its provision for civil penalties, would apply regardless of whether it received EPA approval. Yet that difference suggests that federal law plays an even smaller role in this case than in *Gully*. The only effect of EPA approval is to eliminate the need for Ohio entities to obtain federal, as well as state, permits; that effect merely demonstrates that Congress chose to reduce—not expand—the role of federal law where the state-law enforcement scheme is adequate.

Moreover, the CWA itself confirms that the Administrator's approval of the state law program does not create federal law. The CWA's declaration of goals and policy recognizes that the "primary responsibilities and rights * * * to prevent, reduce, and eliminate pollution" rest on the States. § 101(b), 33 U.S.C. 1251(b). Accordingly, the statute provides that a federally approved state program is to be operated by the State under state law, not federal law. For example, before a State can obtain authority to issue permits in place of EPA, Section 402(b) of the CWA requires that the State "submit to the Administrator a full and complete description of the program it proposes to establish and administer *under State law*." 33 U.S.C. 1342(b) (emphasis added). Any State wishing to run its own permit program is required to demonstrate to EPA "that the laws *of such state* * * * provide adequate authority to carry out the desired program." *Ibid.* (emphasis added). What is state law before approval remains state law after approval. See *California* v. *Department of the Navy*, 845 F.2d 222 at 225; *McClellan Ecological Seepage Situation (MESS)* v. *Weinberger*, 655 F. Supp. 601, 604-605 (E.D. Cal. 1986).

The legislative history is equally clear that an EPA-approved state program is operated under state law. For example, Congressman Wright, one of the managers of

the 1972 amendments, explained during the House floor debate on the 1972 conference bill that

> [i]f the Administrator determines that a State has the authority to issue permits consistent with the act, he shall approve the submitted program. In that event, the States, *under State law*, could issue State discharge permits. *These would be State, not Federal actions* * * *.

118 Cong. Rec. 33,761 (1972) (emphasis added). Similarly, the Conference Report on the 1977 amendments emphasized that state permits are issued "under state law," and that state permit programs are "not a delegation of federal authority." In explaining a state's permitting authority under Section 404 of the Act, the conference report explains:

> The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of federal authority. This is a point which has been widely misunderstood with regard to the permit program under section 402 of the Act. That section, after which the Conference substitute concerning State programs for the discharge of dredged or fill material is modeled, also provides for *State programs* which *function in lieu of the Federal program and does not involve a delegation of Federal authority.*

H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 101 (1977), *reprinted in* 3 *Leg. Hist.* 288; accord, 3 *Leg. Hist.* 360 (remarks of Rep. Wright) (emphasis supplied).[24]

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[24] EPA's implementing regulations governing the approval of state NPDES permit programs are in accord. For example, EPA's regulations require the state to "submit a description of the program it proposes to administer in lieu of the federal program *under State law*." 40 C.F.R. 123.22 (1985) (emphasis added).

III. THE CWA CITIZEN SUIT PROVISION DOES NOT WAIVE FEDERAL SOVEREIGN IMMUNITY FROM ASSESSMENT OF CWA CIVIL PENALTIES

The State contended below that, even if the CWA federal facilities provision does not waive federal sovereign immunity from assessment of civil penalties, the CWA citizen suit provision does.[25] The citizen suit provision, CWA § 505(a), 33 U.S.C. 1365(a), provides that "any citizen may commence a civil action on his own behalf * * * against any person (including * * * the United States * * *)" and that the district courts in such actions "shall have jurisdiction * * * to enforce" federal or state NPDES permits and orders of federal or state administrative agencies "and to apply any appropriate civil penalties under [the CWA civil penalties provision, § 309(d), 33 U.S.C. 1319(d)]." See generally *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1988). The State argues that, by including the federal government among the entities that are subject to citizen suits, Congress not only made the federal government a proper party defendant in a citizen suit, but also waived federal sovereign immunity from assessment of civil penalties in such suits.

The State's argument misapprehends the relationship between the CWA citizen suit and civil penalties provisions. Congress could have written the citizen suit provision to contain its own civil penalties scheme, complete with standards governing imposition and payment of such penalties in citizen suits. Congress, however, chose

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[25] The court of appeals did not address this issue, see Pet. 11 n.6, although it did address the closely related question whether the citizen suit provision of RCRA waived federal sovereign immunity from civil penalties. See pp. 40-44, *infra*. In the only appellate decision that has addressed the question, the Tenth Circuit recently agreed with the State's argument. *Sierra Club* v. *Lujan*, 931 F.2d 1421 (1991).

not to do so.[26] Instead, the text of the citizen suit provision specifies that the general civil penalties provision, with all of its incidents, applies in citizen suits: such civil penalties as are "appropriate" under the civil penalty provision may be imposed in citizen suits. By qualifying a court's authority to award civil penalties with the word "appropriate," Congress plainly intended to limit the applicability of such penalties, not to expand the number of entitites otherwise subject to them.[27]

The United States is not subject to civil penalties under the CWA civil penalty provision. Section 309(d) of the CWA provides that "[a]ny person who violates [an NPDES permit] shall be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. 1319(d). The term "person" is defined in the statute to include a number of different entities—"an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body," CWA § 502(5), 33 U.S.C. 1362(5)—a list that pointedly does not include the federal government. Since the United States is not a "person" for purposes of the civil penalties provision, it is never "appropriate" to assess civil penalties against the United States under CWA Section 309(d). Therefore, although the citizen suit provision plainly authorizes civil penalties

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[26] Indeed, as Judge Guy pointed out in dissenting from the court of appeals' ruling on the corresponding RCRA citizen suit provision, Congress chose the wrong provision in which to insert the words "including the United States" if it intended to waive sovereign immunity from civil penalties. See Pet. App. 26a. Had Congress added similar language to the civil penalties provision, Congress would have made clear that the United States was subject to such penalties.

[27] Both the citizen suit and civil penalty provisions were last modified in ways relevant to this issue in 1972. Pub. L. No. 92-500, § 2, 86 Stat. 860, 888. The legislative history gives no indication that Congress considered whether civil penalties could be assessed against the federal government.

where "appropriate"—*i.e.*, against parties subject to them who meet the other requirements for such penalties—it equally plainly prohibits such penalties where not "appropriate"—*i.e.*, against federal defendants.

Even if the language of the statute were less clear, the State's argument would still be meritless. Initially, it would have been illogical for Congress to refrain from waiving federal sovereign immunity from civil penalties in the federal facilities provision of the Act—the provision specifically addressing the extent to which the federal government is subject to the CWA—but then to undo the limitations of its carefully crafted waiver of sovereign immunity so long as the enforcement action is brought by "any citizen." Under our view, the federal facilities provision and the citizen suit provision logically coexist. Both provisions permit suits against the federal government for prospective, injunctive relief, and neither authorizes suits against the federal government for retrospective, penal relief.

In addition, the civil penalties available under the citizen suit provision in a suit against any entity—state, local, or private—are those assessed under the CWA's civil penalty provisions; therefore, they are necessarily *federal* civil penalties payable to the federal treasury. See *Gwaltney*, 484 U.S. at 53. The civil penalties that the State seeks would consequently simply be transferred from one account in the federal Treasury to another; surely it should not be assumed absent some more explicit statement that Congress thus intended such a shift in funds amongst Treasury accounts through a procedure outside congressional control.[28]

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[28] In 1979, the Department of Justice sought a ruling from the Comptroller General as to whether federal civil penalties under an analogous provision of the Clean Air Act would be payable from the permanent indefinite appropriation available for satisfaction of judgments against the federal government (see 28 U.S.C. 2414; 31 U.S.C. 724a (Supp. II 1978)) or from appropriations available to the defendant agency. The Comptroller General de-

IV. THE RCRA FEDERAL FACILITIES PROVISION DOES NOT WAIVE FEDERAL SOVEREIGN IMMUNITY FROM ASSESSMENT OF CIVIL PENALTIES

Like every other appellate court that has considered the issue, the court of appeals correctly rejected the State's argument that the RCRA federal facilities provision waives federal immunity from assessment of civil penalties for hazardous waste disposal violations.[29] That conclusion follows from the language of RCRA Section 6001, which differs from the language of CWA Section 313(a) in making explicit that the "sanctions" as to which immunity is waived are those necessary to enforce injunctive relief.

The federal facilities provision of RCRA provides that the federal government and its agencies

> shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) * * * in the

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termined that the source of funds depends on whether the agency contests its liability for the penalty (in which case payment could come from the judgment fund) or concedes such liability (in which case the payment must come from program funds). 58 Comp Gen. 667 (1979).

[29] See *United States* v. *Washington*, 872 F.2d 874 (9th Cir. 1989); *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990). Accord *McClellan Ecological Seepage Situation (MESS)* v. *Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986); *Meyer* v. *United States Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986). Cf. *California* v. *Walters*, 751 F.2d 977 (9th Cir. 1984) (criminal penalties). But see *Maine* v. *Department of the Navy*, 702 F. Supp. 322 (D. Me. 1988), appeal pending, No. 91-1064 (1st Cir.). Cf. *Alabama* v. *Veterans Administration*, 648 F. Supp. 1208, 1210-1211 (M.D. Ala. 1986) (interpreting federal facilities provision of Clean Air Act).

> same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

42 U.S.C. 6961. That language cannot be construed to waive federal sovereign immunity from civil penalties.

1. First, the term "sanctions"—which the State has argued is the crucial term waiving sovereign immunity from civil penalties in the parallel provision of the CWA—cannot be construed as used in the above provision to include civil penalties. In its first appearance, it includes only sanctions imposed to secure compliance with injunctive relief—"such sanctions as may be imposed by a court *to enforce such* [i.e., *injunctive*] *relief*." The term "sanction" appears once more, but this time too it is qualified with a phrase expressly limiting it to sanctions necessary to enforce injunctive relief—"process or sanction *with respect to the enforcement of any such injunctive relief*." Thus, Congress in RCRA employed the very term ("sanction") that the State has strenuously argued—in the context of the CWA—should be interpreted to refer to civil penalties. Yet, the statutory language here makes clear that it does *not* refer to civil penalties.[30]

Nor does Congress's use of the term "all * * * requirements" operate to waive sovereign immunity from civil

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[30] As the court of appeals observed, "the specific mention of injunctive sanctions appears to omit penalties too neatly to be an accident." Pet. App. 12a. Cf. *California* v. *Walters*, 751 F.2d at 978 ("Section 6961 plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions.").

penalties.[31] As used in the above provision, "all * * * requirements" is a general term followed by specific exemplars: permit and reporting requirements, and injunctive relief and sanctions to enforce such relief. Nothing in the language of the statute suggests that the general term should be read to extend the waiver of sovereign immunity to an entirely new category—federal and state civil penalties or other penal measures.

2. The legislative history of the RCRA federal facilities provision supports the conclusion that Congress did not intend to waive federal sovereign immunity from civil penalties.

Section 6001 was enacted by the 94th Congress in 1976 and has remained unchanged since that time. As reported by committee, the House bill, H.R. 14496, 94th Cong., 2d Sess. (1976), had separate provisions for solid waste and hazardous waste. It required EPA to promulgate regulations governing disposal of solid waste by federal agencies and provided that EPA could sue for injunctive relief or civil penalties for violation of those regulations. H.R. 14496, §§ 601(a)(1) and (3); see H.R. Rep. No. 1491, 94th Cong., 2d Sess. 66-67 (1976). As to hazardous wastes, the bill generally provided that EPA could sue any "person" who was in violation of hazardous waste regulations to be promulgated by EPA for injunctive relief and civil penalties. § 308(a). The federal facilities provision waived federal sovereign immunity as to such suits—including the remedy of civil penalties—by providing that, for purposes of the hazardous waste enforcement provisions, "the term 'person' includes any department, agency, or instrumentality of the United States." § 601(b); see H.R. Rep. No. 1491, *supra*, at 66-67.

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[31] Indeed, as the court of appeals pointed out (Pet. App. 11a), if the term "all * * * requirements" included civil penalties and other sanctions, the discussion of sanctions in both this provision and in the analogous CWA provision would be superfluous.

The language ultimately adopted as RCRA Section 6001 originated as Section 223 of S. 3622, 94th Cong., 2d Sess., which was passed by the Senate on June 30, 1976. 122 Cong. Rec. 21,429. There was no comment in floor debate addressing federal facility compliance. The committee report did not mention civil penalties; it merely paraphrased the language of the bill in stating that federal agencies were to comply with "requirements" as if they were private citizens. Although the report did not cite the then-recent decisions in *Hancock* v. *Train* and *EPA* v. *California*, it twice noted that the bill mandates compliance with permits and "specifically any requirements to obtain permits." S. Rep. No. 988, 94th Cong., 2d Sess. 24 (1976); *id.* at 23. It also mentioned that Section 223 paralleled the federal facility provisions of Section 118 of the Clean Air Act, 42 U.S.C. 1857f (1976),[32] and Section 313 of the Clean Water Act, 33 U.S.C. 1323 (1976).[33] S. Rep. No. 988, *supra*, at 24.

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[32] Section 118 of the Clean Air Act, 42 U.S.C. 1857f (1976), provided in relevant part:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

[33] Section 313(a) of the Clean Water Act, 33 U.S.C. 1323(a) (1976), provided in relevant part:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

Neither of those provisions had yet been amended to take account of *Hancock* v. *Train* and *EPA* v. *California*; there is therefore little doubt that those provisions did not at that time authorize civil penalties.

When H.R. 14496 was brought to the House floor, a substitute version was offered that replaced Section 601 with a Section 6001 incorporating Section 223 of the Senate bill verbatim. Representative Rooney, the majority floor manager of H.R. 14496 for the House Interstate and Foreign Commerce Committee, explained that the substitute H.R. 14496 adopted the Senate provision on federal facilities, which "[r]equires Federal facilities to comply with State and local solid waste plans." 122 Cong. Rec. 32,631 (1976). Representative Skubitz, the minority floor manager, explained that federal facilities "will be subject to State law and regulation." 122 Cong. Rec. 32,599 (1976).

Three features of this history are of particular relevance. First, Congress substituted what became Section 6001 for the provision in the original House bill that would have expressly subjected the federal government to civil penalties. The House bill would have permitted such penalties only where assessed under RCRA itself, not state law, and even then only in suits brought by EPA; subjecting the federal government to indeterminate civil penalties imposed under state law would have been a dramatic step that the House, at that time at least, was not prepared to take. Cf. *Hancock* v. *Train*, 426 U.S. at 178-179. The Senate bill, which ultimately became law, eliminated even that limited express authorization for civil penalties against the federal government. In light of longstanding principles requiring explicit and unambiguous waivers of sovereign immunity—principles of which Congress was certainly aware in light of their then-recent reaffirmance in *Hancock* v. *Train* and *EPA* v. *California*—the absence of any such express provision suggests strongly that Congress intended no waiver as to

civil penalties. Cf. *United States* v. *United Mine Workers*, 330 U.S. 258, 273 (1947).

Second, one of the purposes of the clear statement rule regarding waivers of sovereign immunity is to assure that Congress, rather than a court, has had the opportunity carefully to consider the wisdom of a particular waiver.[34] In this case, the history of the provision of the Senate bill that ultimately became Section 6001 demonstrates, if anything, that Congress never thought about civil penalties. The Senate committee report nowhere discusses civil penalties against federal agencies or mentions that federal facilities will be subject to the civil penalties provision that became Section 3008(g). The floor debates also are devoid of any reference to the issue.

Third, the Senate report clarifies why the language of the federal facilities provision was crafted as it was. The federal facilities provision was intended to track the federal facilities provisions of the Clean Air and Clean Water Acts, neither of which at that time could plausibly

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[34] Indeed, bills are now pending before Congress that would expressly waive sovereign immunity from civil penalties. Both H.R. 2194, 102d Cong., 1st Sess., and S. 596, 102d Cong., 2d Sess., would add the following after the first sentence of Section 6001: "The Federal, State, interstate and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines." H.R. 2194 passed the House on June 24, 1991. 137 Cong. Rec. H4887 (daily ed.). In the hearings on H.R. 2194 before a panel of the House Committee on Armed Services on June 6, 1991, a Department of Energy official has supported the expansion of Section 6001 to include civil penalites, so long as a number of changes are made. Those changes include (a) modifications of the statute to address specific, uniquely federal problems concerning radioactive wastes created largely by weapons programs and (b) a change in the penalty provision to make clear that penalties collected by a State could be used only for environmental programs. Statement of Leo P. Duffy, June 6, 1991. The requirement that waivers of sovereign immunity be clear and unambiguous assures that Congress has had the opportunity to address issues of this sort before a waiver is found. (Copies of Mr. Duffy's statement have been provided to respondents and lodged with the Court.)

be read to waive federal sovereign immunity from civil penalties. Insofar as the language of the provision departed from that of the corresponding Clean Air and Clean Water Act provisions, the report explains that the reason was to subject federal facilities to state permit, reporting, and similar "procedural" requirements, and thus avoid application of this Court's decisions in *Hancock* v. *Train* and *EPA* v. *California* to the newly enacted RCRA. In short, the legislative history confirms that Congress intended to accomplish certain specific objectives in modifying the language of Section 6001 and gave no positive consideration to subjecting federal facilities to state civil penalties and other penal measures.[35]

V. THE RCRA CITIZEN SUIT PROVISION DOES NOT WAIVE FEDERAL SOVEREIGN IMMUNITY FROM ASSESSMENT OF RCRA CIVIL PENALTIES

We argue above that the CWA citizen suit provision, by including the United States among those entities subject to suit under the CWA, does not thereby waive federal sovereign immunity from civil penalties. The same

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[35] The State has argued (C.A. Br. 39-40) that an isolated sentence in the conference report for the Superfund Amendments and Reauthorization Act of 1986 (SARA), as well as a single floor statement in the SARA debates, demonstrate that RCRA Section 6001 waives federal sovereign immunity from civil penalties. See H.R. Rep. No. 962, 99th Cong., 2d Sess. 242 (1986) (observing that § 120 of SARA, 42 U.S.C. 9620, "clarifies that CERCLA, together with RCRA, requires Federal facilities to comply with all Federal, State and local requirements, procedural and substantive, including fees and penalties"). See also 132 Cong. Rec. 28,430 (1986) (statement of Sen. Mitchell) (stating that RCRA § 6001, together with CERCLA § 120, "can leave no doubt that Federal facilities are subject to State laws, including State fees and penalties"). SARA did not amend RCRA Section 6001. The views expressed in a conference committee report and in a single statement in a floor debate on an entirely different piece of legislation enacted ten years after RCRA Section 6001 are not probative of the meaning of Section 6001. See, *e.g.*, *Secretary of the Interior* v. *California*, 464 U.S. 312, 330-331 n.51 (1984); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. at 63 n.4.

conclusion and much of the same reasoning apply to the RCRA citizen suit provision, § 7002(a), 42 U.S.C. 6972 (a), whose wording and structure are in relevant respects very similar to those of the corresponding CWA provision.

1. In language similar to the corresponding CWA provision, the RCRA citizen suit provision provides that "any person may commence a civil action on his own behalf * * * against any person (including * * * the United States)" and that the district courts in such actions "shall have jurisdiction * * * to enforce" federal or state permits and orders of federal or state administrative agencies "and to apply any appropriate civil penalties under [the RCRA civil penalties provision, § 3008(a) and (g)]." [36] The court of appeals held that, by including the federal government among the entities that are subject to citizen suit, Congress not only made the federal government a proper party defendant in a citizen suit, but also waived federal sovereign immunity from assessment of civil penalties in such suits. Pet. App. 12a-16a.

The court's conclusion is mistaken. As with the corresponding CWA provision, see pp. 31-33, *supra*, the RCRA citizen suit provision does not itself set out a scheme for assessing civil penalties, but instead refers back to the RCRA civil penalties provision for a determination of what civil penalties are "appropriate." Similarly, as with the corresponding CWA provision, the RCRA civil penalties provision does not apply to the United States. Section 3008(g) of RCRA provides that "[a]ny person who violates any requirement [of RCRA] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." 42 U.S.C. 6928(g). RCRA defines the term "person" even more inclusively than the CWA to include a number

[36] The citizen suit provision authorizes a district court in a citizen suit to assess civil penalties under 42 U.S.C. 6928(a), as well as 42 U.S.C. 6928(g). RCRA Section 3008(a), 42 U.S.C. 6928(a), authorizes civil penalties in EPA-initiated enforcement actions.

of different entities—"an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body," RCRA § 1004(15), 42 U.S.C. 6903(15)—a list that still does not include the federal government.[37] Since the United States is not a "person" for purposes of awarding RCRA civil penalties, it is never "appropriate" to do so in a RCRA citizen suit.

As with the corresponding CWA provision, other considerations support that conclusion. Initially, it would have been illogical for Congress to refrain from waiving federal sovereign immunity from civil penalties in the federal facilities provision of the Act—the provision specifically addressing the extent to which the federal government is subject to RCRA—but then to undo the limitations of its carefully-crafted waiver of sovereign immunity so long as the enforcement action is brought by any citizen. See p. 33, *supra*. Moreover, the RCRA civil penalties provision expressly provides that one who violates RCRA is "liable to the United States for a civil penalty." If assessed against the federal government, RCRA civil penalties would thus simply be transferred from one account in the federal Treasury to another, and it should not be assumed absent some more explicit statement that Congress intended to adopt such a measure. See p. 33, *supra*.

2. The legislative history of the RCRA citizen suit provision lends no support to the court of appeals' conclusion. The citizen suit provision was originally enacted in 1976. Pub. L. No. 94-580, § 2, 90 Stat. 2825. The language that included "the United States" among the parties subject to a citizen suit was in the provision as originally enacted. At that time, however, it provided only for injunctive relief; in a citizen suit, a district court had jurisdiction "to enforce [a] regulation or

[37] In fact, while the CWA definition of "person" applies "[e]xcept as otherwise specifically provided," 33 U.S.C. 1362, the corresponding RCRA provision omits that qualification.

order." 42 U.S.C. 6972(a) (1982). In 1984, Congress amended the statute extensively. The citizen suit provision was amended to provide, *inter alia*, that a district court would have jurisdiction "to apply any appropriate civil penalties" under the RCRA civil penalties provisions.

Insofar as they address the citizen suit provision, the conference report, committee reports, and floor debate are devoid of any mention of the availability of civil penalties against the United States. See H.R. Conf. Rep. No. 113, 98th Cong., 2d Sess. 117-118 (1984); H.R. Rep. No. 198, 98th Cong., 1st Sess. Pt. 1, at 53 (1983); S. Rep. No. 284, 98th Cong., 1st Sess. 55 (1983). That fact ought not be surprising, because the amendment had no particular reference to suits in which the federal government was a defendant; it simply made civil penalties, where "appropriate," available in citizen suits against any entity covered by RCRA. The amendments made no change to the civil penalty provision or the statute's definition of "person" that specified the parties against whom civil penalties were "appropriate."

In concluding that the citizen suit provision waived federal sovereign immunity from civil penalties, the court of appeals erroneously relied (see Pet. App. 15a) on a single passage from the Senate committee report on the bill:

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States."

S. Rep. No. 284, *supra*, at 44.

Even if that passage were to be given substantial weight in the analysis, the fact remains that the text of the citizen suit and civil penalty provisions in the statute is controlling. That statutory text does not authorize the

award of civil penalties against the United States and could not be read to provide a clear and unambiguous waiver of immunity from such penalties. In any event, however, the passage quoted was not a part of the extensive discussion of the amendments to the citizen suit provision, but was instead included in a discussion of what became RCRA Section 3016, 42 U.S.C. 6937. Section 3016 has nothing to do with civil penalties, but rather requires federal facilities to compile and submit inventories of hazardous waste sites to EPA. The fact that the above language was buried in a section of the Senate Committee report dealing with an entirely different provision cannot be taken to indicate congressional intent to waive sovereign immunity from civil penalties, especially when the legislative history of the citizen suit provision itself—which was amended at the same time—contains no indication that such a change was intended.

There is, accordingly, no clear and unambiguous waiver of sovereign immunity from civil penalties in any of the statutory provisions at issue.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Sections 313(a) and 505(a) of the Clean Water Act, 33 U.S.C. 1323(a), 1365(a) provide:

§ 1323. Federal facilities pollution control.

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer,

agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with Section 1441 et seq. of Title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order of the process of such court. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a [*sic*] requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of Section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or catergories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the

Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

§ 1365. Citizens suits.

(a) Authorization; jurisdiction.

Except as provided in subsection (b) of this section and Section 1319(g)(6) of this title, any citizen may commence a ciivl action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under Section 1319(d) of this title.

2. Sections 6001 and 7002(a) of RCRA, 42 U.S.C. 6961, 6972(a) provide:

§ 6961. Application of Federal, State and local law to Federal facilities.

Each department, agency, and instumentality of the executive, legislative, and judicial branches of

the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

§ 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district

in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) or (g) of this title.

3. Ohio Rev. Code Ann. § 3734.13(C), as amended 1985 Ohio Laws 2295, provides:

§ 3734.13 Enforcement orders; emergency orders; procedure upon violation.

* * * *

(C) If the director determines that any person is violating or has violated this chapter, a rule adopted thereunder, or a term or condition of a permit issued thereunder, the director may, without prior issuance of an order, request in writing that the attorney general bring a civil action for appropriate relief, including a temporary restraining order, preliminary or permanent injunction, and civil penalties in any court of competent jurisdiction. Such an action shall have precedence over all other cases. The court may impose upon the person a civil penalty of not more than ten thousand dollars for each day of each violation of this chapter, a rule adopted thereunder or a term or condition of a permit issued thereunder, which moneys shall be paid into the hazardous waste clean-up fund created in Section 3734.28 of the Revised Code.

Any action under this section is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.

4. Ohio Rev. Code Ann. § 6111.09 (Anderson Supp. 1987) provides:

§ 6111.09 Penalty paid to state treasury

Any person who violates Section 6111.07 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars per day of violation. The Attorney General, upon written request by the director of environmental protection, shall commence an action under this section against any person who violates Section 6111.07 of the Revised Code. Any action under this section is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.

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Nos. 90-1341 and 90-1517

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY,
Petitioner,

v.

STATE OF OHIO, et al.,

STATE OF OHIO, et al.,
Cross-Petitioners

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT STATE OF OHIO

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QUESTIONS PRESENTED

1. Whether the federal facilities provision of the Clean Water Act, §313, 33 U.S.C. 1323, waives the sovereign immunity of the United States from assessment of civil penalties for violations of state water pollution control laws.

2. Whether Sections 313 and 505 of the Clean Water Act, 33 U.S.C. 1323 and 1365, waive the sovereign immunity of the United States from assessment of civil penalties pursuant to citizen-suit for violations of the Clean Water Act.

3. Whether the federal facilities provision of the Resource Conservation and Recovery Act ("RCRA"), §6001, 42 U.S.C. 6961, waives the sovereign immunity of the United States from assessment of civil penalties for violations of state hazardous waste laws.

4. Whether Sections 6001 and 7002 of RCRA, 42 U.S.C. 6961 and 6972, waive the sovereign immunity of the United States from assessment of civil penalties pursuant to citizen suit for violations of RCRA.

PARTIES TO THE PROCEEDINGS

This case was brought in the district court and litigated in the court of appeals by the State of Ohio on the relation of its Attorney General, Anthony J. Celebrezze, Jr. succeeded by Lee Fisher. The Defendants-Appellants before the court of appeals were the U.S. Department of Energy and Secretary of Energy James D. Watkins.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES viii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. **Because Pervasive Defiance From Federal Agencies Has Thwarted Congressional Plans To Comprehensively Control Hazardous Waste And Water Pollution, Congress Has Enlisted The States' Assistance By Providing Them With The Enforcement Mechanisms Necessary To Force Federal Agency Cooperation** 7

A. **RCRA And The Clean Water Act Establish Comprehensive Programs To Abate Dangerous Chemicals And To Purify The Nation's Water. All Persons, Including Federal Agencies, Are Required To Do Their Share To Safely Handle Their Hazardous Wastes And To Restore The Usefulness Of The Water By Controlling Their Own Pollution** 7

B. **Because Federal Agencies Have Exploited Sovereign Immunity As A Shield For Their Pollution Practices, Congress Has Broadly Removed Sovereign Immunity As A Defense In The Field Of Pollution Control** 9

C. Because This Court In *Hancock v. Train* Equated "Procedural Requirements" With "Enforcement Mechanisms," Congress Waived Federal Agency Immunity For Civil Penalties And Other Enforcement Mechanisms By Subjecting The Agencies To "All Procedural Requirements." 11

D. Because Penalties Are Necessary To Deter Illegal Activity, Congress Found That Penalties Are An Essential Component Of Its Comprehensive Programs To Reduce And Eliminate Pollution 15

E. Because The Department Of Justice Prohibits The U.S. Environmental Protection Agency From Suing Sister Federal Agencies For Illegal Activities, The States Must Be Allowed To Utilize The Civil Penalty Deterrent Provided By Congress To Enforce The Law At Federal Facilities 19

II. The Rules Of Statutory Construction Applicable To Penal Laws And Waivers Of Sovereign Immunity Respect The Intent Of Congress, Rather Than Utilizing An "Especially Rigorous Application" Of Strict Construction Dependent On The Invention Of Strained, Improbable Meanings For The Statutes 20

A. When Applying Strict Construction To Penal Laws And Waivers Of Sovereign Immunity, The Court Has Drawn Upon The History And Purpose Of The Legislation To Determine Legislative Intent 20

B. When Construing Penal Statutes And Waivers Of Sovereign Immunity, The Court Has Interpreted Their Terms According To Their Plain And Ordinary Meaning 21

C. Strict Construction Does Not Assign The Narrowest Possible Meaning To Penal Laws And Immunity Waivers, Especially Where These Statutes Are Enacted In Broad, Sweeping Terms 22

D. When Applying The Rule Of Strict Construction, The Court Has Refrained From Creating Or Enlarging Exceptions To Penal Laws And Waivers Of Immunity 23

E. Congress Is Not Required To Specifically Spell Out Each And Every Federal Action Included In A Penal Statute Or Immunity Waiver 24

F. Contrary To DOE's Position, The Decisions Of This Court Do Not Authorize An "Especially Rigorous Application" Of Strict Construction To Penalty Waivers 24

III. The Court Of Appeals Below Correctly Held That Ohio's Civil Penalties Arise Under Federal Law, Since Ohio's Water Pollution Prevention Program and Penalties Originated From The Clean Water Act 26

A. As Commonly Used, And As Used In The Clean Water Act, The Term "Sanctions" Includes Civil Penalties 26

B. Because Ohio's Penalties Originate Under, Are Mandated By, And Are Approved Under The Clean Water Act, They Are Penalties "Arising Under Federal Law" As That Phrase Is Used In The Federal Facilities Waiver 29

IV. The Citizen Suit Provision Of The Clean Water Act Also Authorizes Civil Penalties Against Federal Facilities For Violating This Law 35

V. The Court of Appeals Correctly Held That The Language And Legislative History Of The RCRA Citizen Suit Provision Express Congressional Intent To Penalize Federal Agencies For Illegal Hazardous Waste Conduct 38

VI. By Interpreting The RCRA Waiver For State Hazardous Waste Penalties In A Manner Inconsistent With The Plain Meaning Of The Language And By Creating An Exception To Exempt Penalties From The Broad Waiver Intended By Congress To Cover All Enforcement Mechanisms, The Court Of Appeals Violated This Court's Principles Of Statutory Construction And Thwarted Congressional Policy 40

A. By Admitting That Congress Used The Words "All Procedural Requirements" To Waive Immunity For Enforcement Mechanisms, And Then Ruling That Procedural Requirements Do Not Include Enforcement Mechanisms, The Court of Appeals Violated The Rules Of Statutory Construction Provided By This Court And Adopted A Rule Of Law Contrary To This Court's Decision In *Hancock v. Train* 41

B. Because The RCRA Waiver Includes All "Requirements" Without Limitation, And Because The Common Meaning Of "Requirements" Includes Civil Penalties, The Court Of Appeals Erred In Deleting Penalties From The Waiver 42

C. By Admitting That The Plain Meaning Of "Requirements" Includes Civil Penalties, And Then Manufacturing Ambiguity As An Excuse To Exempt Penalties From That Plain Meaning, The Court Of Appeals Violated

The Rules Of Statutory Construction Followed By This Court 45

D. The Post-Enactment Legislative Events Cited By DOE Confirm Congress' Original Intent To Waive Immunity For State Hazardous Waste Penalties 47

CONCLUSION 50

APPENDIX

Excerpt from EPA brief in *EPA v. California* a-1

TABLE OF AUTHORITIES

CASES **PAGE**

Adamo Wrecking Co. v. United States,
434 U.S. 275 (1978) 28

Alabama v. Seeber, 502 F.2d 1238 (5th Cir. 1974)
vacated, 426 U.S. 932 (1976) 12, 13

Bowen v. City of New York,
476 U.S. 467 (1986) 23, 42

Canadian Aviator v. United States,
324 U.S. 215 (1945) 23, 42

Citronelle-Mobile .. Gulf Oil Corp.,
591 F.2d 711 (Temp. Emer. Ct. App. 1979),
cert. denied, 444 U.S. 879 (1979) 34

EPA v. California,
426 U.S. 200 (1976) 4, 12, 13, 14, 15, 35, 43, 44, 50

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 27

Federal Land Bank v. Bismarck Lumber Co.,
314 U.S. 95 (1941) 43

Girardier v. Webster College, 563 F.2d 1267
(8th Cir. 1977) 28

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 24, 25, 45, 47

*Gwaltney of Smithfield v. Chesapeake
Bay Foundation, Inc.*, 484 U.S. 49 (1987) 28

Hancock v. Train, 426 U.S. 167
(1976) 4, 6, 11, 12, 13, 14, 15, 35, 41, 43, 44, 50

CASES **PAGE**

Harrison v. PPG Industries, Inc.,
446 U.S. 578 (1980) 45

Helvering v. Credit Alliance Corp.,
316 U.S. 107 (1942) 43

Indian Towing Co. v. United States,
350 U.S. 61 (1955) 23

International Ass'n. of Machinists
v. Central Airlines, 372 U.S. 682 (1963) 33, 34

Kordel v. United States, 335 U.S. 345 (1948) 23

Kosak v. United States,
465 U.S. 848 (1984) 22, 23, 29, 35, 47

Legal Environmental Assistance Foundation v. Hodel,
586 F. Supp. 1163 (E.D. Tenn. 1984) 18

Lehman v. Nakshian, 453 U.S. 156 (1981) 24

Library of Congress v. Shaw, 478 U.S. 310 (1986) 25

Maine v. Navy, 702 F.Supp. 322 (D. Me. 1988)
app. pending, No. 91-1064 (1st Cir.) 46

Mastro Plastics Corp. v. National Labor
Relations Board, 350 U.S. 270 (1956) 20

Metro. Sanitary Dist. Of Greater Chicago v.
United States, 737 F.Supp. 51 (N.D. Ill. 1990) 30

Metropolitan Sanitary Dist. v. U.S. Dept. of Navy,
722 F.Supp. 1565 (N.D. Ill. 1989) 28, 30

Middlesex Cty. Sewerage Auth. v. National
Sea Clammers, 453 U.S. 1 (1981) 15

CASES **PAGE**

Missouri v. Jenkins, 491 U.S. 274 (1989) 25

Missouri Pac. R.R. v. Ault, 256 U.S. 554 (1921) 24, 25

Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) 36

National City Bank of New York v. Republic of China, 348 U.S. 356 (1955) 21, 42

Northern Securities Co. v. United States, 193 U.S. 197 (1904) 25, 50

Oceanic Steam Navigation Co. v. Stranaham, 214 U.S. 320 (1908) 15

P.C. Pfeiffer Company v. Ford, 444 U.S. 69 (1979) 43

Philbrook v. Glodgett, 421 U.S. 707 (1975) 20, 42

Quivira Mining Co. v. U.S. EPA, 765 F.2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986) 8

Richards v. United States, 369 U.S. 1 (1962) 21, 42

Russello v. United States, 464 U.S. 16 (1983) 48

Sierra Club v. Lujan, 931 F.2d 1421 (10th Cir. 1991) 28, 37

Sierra Club v. Lujan, 728 F.Supp. 1513 (D. Colo. 1990), aff'd 931 F.2d 1421 (10th Cir. 1991) 38

Singleton v. Wulff, 428 U.S. 106 (1976) 36

CASES **PAGE**

Student Public Interest Research v. Monsanto Co., 600 F. Supp. 1474 (D.N.J. 1985) 38

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 48

Tull v. United States, 481 U.S. 412 (1987) 38

United States v. Bramblett, 348 U.S. 503 (1955) 22

United States v. Braverman, 373 U.S. 405 (1963) 21

United States v. Cook, 384 U.S. 257 (1966) 22

United States v. James, 478 U.S. 597 (1986) 22, 29

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 15

United States v. Kubrick, 444 U.S. 111 (1979) 23

United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961) 22

United States v. Muniz, 374 U.S. 150 (1963) 23

United States v. Standard Oil Co., 384 U.S. 224 (1966) 21

United States v. Turkette, 452 U.S. 576 (1981) 22, 46

United States v. Ward, 448 U.S. 242 (1980) 28

United States v. Yellow Cab Co., 340 U.S. 543 (1951) 21, 22, 23, 24, 25, 47

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 34

PAGE

CONSTITUTION

U.S. Const. Art. III 34

STATUTES, RULES AND REGULATIONS

28 U.S.C. 1331 ..... 6, 33, 34

CLEAN WATER ACT, 33 U.S.C. 1251 *et seq.*:

33 U.S.C. 1251(a) 8
33 U.S.C. 1251(a)(1) 9
33 U.S.C. 1251(b) 9, 10, 31
33 U.S.C. 1252(a) 8
33 U.S.C. 1314(a)(1) 37
33 U.S.C. 1314(a)(2) 37
33 U.S.C. 1314(b) 37
33 U.S.C. 1314(c) 37
33 U.S.C. 1314(d)(1) 37
33 U.S.C. 1314(d)(2) 37
33 U.S.C. 1314(d)(3) 37
33 U.S.C. 1314(e) 37
33 U.S.C. 1314(f) 37
33 U.S.C. 1314(g) 31
33 U.S.C. 1314(i)(1) 31
33 U.S.C. 1314(i)(2) 31
33 U.S.C. 1319(a) 30
33 U.S.C. 1319(a)(1) 31
33 U.S.C. 1319(a)(3) 31
33 U.S.C. 1319(c)(1)(A) 31
33 U.S.C. 1319(c)(1)(B) 31
33 U.S.C. 1319(c)(2)(A) 31
33 U.S.C. 1319(c)(2)(B) 31
33 U.S.C. 1319(c)(3)(A) 31
33 U.S.C. 1319(d) 31, 36, 37, 38
33 U.S.C. 1319(g) 31
33 U.S.C. 1323 ..... 5, 6, 10, 26, 27, 28, 29, 34, 35, 36, 38
33 U.S.C. 1323(a) 9, 36
33 U.S.C. 1342 ..... 5, 30, 31, 32
33 U.S.C. 1342(a)(3) 31
33 U.S.C. 1342(b) 9, 30
33 U.S.C. 1342(b)(7) 32

PAGE

33 U.S.C. 1342(c)(1) 30
33 U.S.C. 1342(c)(2) 30, 31
33 U.S.C. 1342(d)(2) 30
33 U.S.C. 1342(k) 30
33 U.S.C. 1345(d) 37
33 U.S.C. 1362(5) 37
33 U.S.C. 1365 ..... 6, 30, 35, 36, 38
33 U.S.C. 1365(a) 36, 37
33 U.S.C. 1365(a)(1) 36

CODE OF FEDERAL REGULATIONS
40 C.F.R. 123.27(a)(3) 32
40 C.F.R. 123.27(a)(3)(i) 32
40 C.F.R. 123.27(c) 32, 38

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), 42 U.S.C. 6901 *et seq.*:
42 U.S.C. 6902(a)(1),(7) 9
42 U.S.C. 6905(a) 9, 19
42 U.S.C. 6926 9
42 U.S.C. 6961 ..... 9, 38, 42, 45, 47
42 U.S.C. 6972 ..... 6, 38, 39, 40
42 U.S.C. 6972(a) 3, 6, 39, 40

OHIO REVISED CODE
O.R.C. 6111.01(I) 33
O.R.C. 6111.03 32
O.R.C. 6111.03(J) 32, 33
O.R.C. 6111.03(J)(3) 32
O.R.C. 6111.09 ..... 3, 6, 33, 34, 35

MISCELLANEOUS

Conf. Rep. No. 962, 99th Cong., 2d Sess. (1986) 48

Conf. Rep. No. 1133, 98th Cong., 2d Sess. (1984) 39

Conf. Rep. No. 1236, 92d Cong., 2d Sess. (1972) 31

PAGE

H.R. Rep. No. 111, 102d Cong., 1st Sess. (1991) 17, 19, 48

H.R. Rep. No. 141, 101st Cong., 1st Sess. (1989) 49

H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977) 10, 28, 44

H.R. Rep. No. 911, 92d Cong., 2d Sess. (1972) 10, 16, 27, 31

H.R. Rep. No. 1060, 100th Cong., 2d Sess. (1988) 49

H.R. Rep. No. 1491, 94th Cong., 2d Sess. (1976) 7, 8, 11, 16, 27, 44

S. Rep. No. 67, 102d Cong., 1st Sess. (1991) 49

S. Rep. No. 284, 98th Cong., 1st Sess. (1983) 39, 40

S. Rep. No. 370, 95th Cong., 1st Sess. (1977) 11, 15, 28, 29, 44

S. Rep. No. 414, 92d Cong., 2d Sess. (1971) 10

S. Rep. No. 988, 94th Cong., 2d Sess. (1976) 8, 9, 11, 40, 44

122 Cong. Rec. 32,599 (Sept. 27, 1976) 45

132 Cong. Rec. 28,430 (Oct. 3, 1986) 48

Cleanup at Federal Facilities: Hearing On H.R. 765 Before The Subcomm. On Transportation And Hazardous Materials Of The House Comm. On Energy And Commerce, 101st Cong., 1st Sess. (1989) 11

PAGE

Rothmel, *When Will The Federal Government Waive The Sovereign Immunity Defense And Dispose Of Its Violations Properly?*, 65 Chi.-Kent L. Rev. 581 (1990) 19

Ballentine's Law Dictionary (3rd ed. (1969) 27

Black's Law Dictionary (6th ed. 1990) 27, 28

Webster's New World Dictionary (2d ed. 1978) 29

Webster's Third New International Dictionary 1929 (3d ed. 1981) 42

Nos. 90-1341 and 90-1517

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY,
Petitioner,

v.

STATE OF OHIO, et al.,

STATE OF OHIO, et al.,
Cross-Petitioners

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT STATE OF OHIO

STATEMENT OF THE CASE

In March of 1986, the State of Ohio filed suit against the U.S. Department of Energy ("DOE") for widespread and longstanding violations of state and federal pollution laws. For years, DOE had been egregiously violating both the hazardous waste and water pollution laws. These illegal activities took place at DOE's Feed Materials Production Center ("FMPC"), also commonly known as the Fernald facility, located near Cincinnati.

The Complaint describes thirteen types of hazardous waste safety standards violated at the FMPC. J.A. 14-29,

Counts 3-15. DOE illegally dumped hazardous waste into a waste pit, allowed hazardous waste to leak from an illegal drum storage site, and carried on other unlawful hazardous waste activities. J.A. 8-9, 14-16, Count 3 & Par. 18-23.

Although all hazardous waste facilities have been required since 1981 to install adequate monitor wells to detect hazardous waste constituents leaking into the groundwater, the Complaint recounts that DOE had not yet complied with this standard five years later. J.A. 19-20, Count 7. Contamination is believed to be seeping from the illegal hazardous waste disposal pit. J.A. 17-18, Count 5.

To compound the fact that treatment, storage, and disposal of hazardous waste at the FMPC was illegal, DOE did not bother to manage the hazardous waste with even a pretense of safety. DOE neglected to regularly inspect its hazardous waste facilities for health hazards (J.A. 24-25, Count 10), to maintain aisle space between drums of waste for detection of leakage and for movement of spill and fire fighting equipment (J.A. 25, Count 11), or to keep an emergency contingency plan educating workers about safe responses to fires, explosions, and releases of hazardous waste (J.A. 26, Count 12). DOE failed to perform the waste analyses necessary for safe storage and disposal (J.A. 28-29, Count 15), to write a proper closure plan (J.A. 20-22, Count 8), and to teach its workers how to handle hazardous waste safely (J.A. 27-28, Count 14). In short, DOE widely disregarded the rules of both the hazardous waste authorities and common sense.

By the time the State filed its Complaint, DOE had subjected the Great Miami River and Paddy's Run to illegal concentrations of hexavalent chromium, total chromium, copper, iron, ammonia, suspended solids, and oil and grease for two and one-half years. J.A. 30-33, Count 17. Excessive contaminants were discharged into the Great Miami for years as a result of DOE's disdain for the schedule in its permit requiring the construction and operation of new pollution abatement equipment by June 30, 1984. J.A. 33-35, Counts 18-23. This pollution continued even after the lawsuit was

filed. Because DOE had fallen so far behind on equipment installation, the consent decree now requires compliance by 1990, six years late.[1] J.A. 70, Par. 4.4, 4.5.

To encourage not only DOE, but other federal agencies as well, to comply voluntarily, the State requested civil penalties to address DOE's irresponsible behavior at the Fernald plant. The State presented civil penalty claims to the district court pursuant to the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. 6972(a)) and state law (O.R.C. 3734.13(C)) for hazardous waste violations and the citizen suit provision of the Clean Water Act (33 U.S.C. 1365(a)) and state law (O.R.C. 6111.09) for water pollution violations. J.A. 14-42.

DOE responded by filing a motion to dismiss, hiding behind the doctrine of sovereign immunity. The district court rejected DOE's contentions, finding a clear statement of Congressional intent to waive immunity from civil penalties under both federal and state hazardous waste and water pollution law. The court of appeals affirmed. Though declining to find a RCRA waiver for state hazardous waste penalties, the court of appeals did implement the RCRA waiver for federal hazardous waste penalties and the Clean Water Act waiver for state water pollution penalties.

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[1] In addition to hazardous waste and water pollution violations, the Complaint also describes the radioactive contamination of air, soil, streams, and groundwater at and near the FMPC, including several wells owned by neighbors. J.A. 10, Par. 28. This contamination was caused by dumping large quantities of waste into six pits, emission of tons of uranium into the air, leakage of radon from two silos, piling of debris on the ground, and discharge of wastes into a creek. Id. These activities were the basis for two counts brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). J.A. 11-14, Counts 1-2. Contrary to DOE's statement (Br. 9, n. 8), the first CERCLA claim was settled by consent decree rather than dismissed. J.A. 64, 76-77. The parties agreed to a stay of the second claim. J.A. 78, Par. 8.2. Neither count is subject to this appeal.

SUMMARY OF ARGUMENT

I. To comprehensively control dangerous chemical wastes and to restore beneficial uses to the nation's waters, Congress has designed comprehensive pollution control programs under RCRA and the Clean Water Act. Due to Congressional concern that noncompliance by more than twenty thousand federal facilities would thwart these comprehensive programs, these statutes contain complete waivers of sovereign immunity to encourage federal compliance. Although private industry, municipalities, and States have shouldered their portions of the pollution control burden, federal agencies have chosen to litigate against the waivers rather than comply. As a result, federal agencies have contaminated their own facilities, their neighbors' properties, and the air, soil and water. Environmental cleanup costs for DOE sites, some of which may be irreversibly contaminated, could cost taxpayers between $40 billion to $70 billion during just the next twenty years.

Although Congress entrusted the States with the primary responsibility to enforce its federal pollution control programs, federal agencies have defied state efforts to enforce these laws. In 1976, the federal agencies obtained decisions in *Hancock v. Train*, 426 U.S. 167 (1976), and *EPA v. California*, 426 U.S. 200 (1976) ruling that federal agencies did not have to apply for state permits under the Clean Air Act and the Federal Water Pollution Control Amendments. The Court held that the waivers in these statutes subjected federal agencies to substantive requirements but not to "enforcement mechanisms," known as "procedural requirements." The Court also stated that Congress would have used the words "all . . . requirements" if a complete waiver were intended.

Congress reacted sharply to these decisions and to the continued federal facility pollution, stating that the waivers in both statutes had been intended as complete waivers. Relying on *Hancock*, Congress used both "all" and "procedural" to provide complete waivers for requirements in RCRA during 1976 and the Clean Water Act during 1977.

To deter federal agencies from further illegal activities, Congress authorized civil penalties under both RCRA and the Clean Water Act. Besides protecting human health and property, penalties are a cost-effective means to prevent the staggering cleanup costs occasioned by illegal spillage and dumping. In the usual situation where the mere threat of a penalty convinces a facility to comply, the taxpayers pay for neither a penalty nor a cleanup project.

II. Well over a decade after the enactments of RCRA and the Clean Water Act amendments, federal agencies are still litigating instead of complying. DOE is asking this Court to narrowly interpret the complete waivers in these statutes by applying an "especially rigorous application" of strict construction, a proposed standard of statutory construction contrary to precedent.

III. The federal facilities section of the Clean Water Act, 33 U.S.C. 1323, waives sovereign immunity for all process and sanctions. As commonly used by Congress, the executive branch, and this Court, a "sanction" is any form of penalty. The use of "sanctions" in Section 313 to include civil penalties is confirmed by a subsequent sentence, which provides that the United States is liable only for "civil penalties arising under Federal law."

The purpose of the latter phrase is to ensure that federal agencies are subject only to civil penalties assessed pursuant to Clean Water Act programs approved by U.S. EPA. States, municipalities, and local governments may not penalize federal agencies unless U.S. EPA has authorized their water pollution programs. Once authorized, a State implements the Clean Water Act program on behalf of and in lieu of U.S. EPA. The Clean Water Act provides that compliance with a state permit is compliance with the Act. U.S. EPA and citizens can enforce the permit as federal law. The statute and its legislative history repeatedly refer to permits issued by a State "under Section 402" of this Act.

The term "arise" means to "originate" or "come into being". The Clean Water Act and U.S. EPA's regulations make state

assessment of civil penalties a mandatory requirement for approval, and continued authorization, of the State's program. Ohio's civil penalty in O.R.C. 6111.09 was enacted to comply with this programmatic requirement. U.S. EPA approved Ohio's penalty provision, and its application to federal agencies, as part of the State's authorized program.

Contrary to DOE's position, "arising under Federal law" does not mean *conversion* into federal law. Therefore, a state penalty provision is still state law, even though it originates under or comes into being as a result of the Clean Water Act.

DOE's attempt to apply caselaw construing federal question jurisdiction ignores the entirely different purpose of the Clean Water Act waiver. "[C]ases arising under" in 28 U.S.C. 1331 reflects Congressional intent to protect federal statutes from interpretation by hostile state courts. "[C]ivil penalties arising under" in 33 U.S.C. 1323 was meant to protect federal agencies from unapproved penalties while simultaneously encouraging federal agency compliance with Congress' comprehensive pollution control program.

IV-V. Both Sections 313 and 505 of the Clean Water Act waive immunity for civil penalties imposed pursuant to citizen suit. Sections 6001 and 7002 of RCRA similarly waive immunity for citizen suit penalties under that statute. Both citizen suit provisions define the United States as a "person", which in turn is subject to the imposition of "appropriate" civil penalties pursuant to the penalty sections of these acts. The use of "appropriate" refers to the judicial discretion to determine the appropriate size of the penalty, as recognized in the caselaw and U.S. EPA regulations. The Senate committee report for RCRA accompanying Section 7002(a) states that federal agencies are subject to its penalty provisions.

VI. To accomplish a complete hazardous waste waiver after *Hancock*, Section 6001 of RCRA waives immunity for "all" requirements. To subject federal agencies to "enforcement mechanisms" such as state penalties, the

section also waives immunity for all "procedural" requirements. This Congressional intent to authorize penalties is complemented by the normal meaning of "requirements," which is "something called for or demanded." In fact, Congress rejected the federal facilities section of the House bill, which would have restricted penalty assessment to U.S. EPA, in favor of a Senate bill waiving immunity for all federal and state requirements.

DOE's proposes to assign the narrowest possible meaning to these statutes by attributing strained, improbable meanings to their terms. The Court should interpret these statutes according to their plain meaning and consistent with the Congressional purpose to comprehensively control pollution. Only then will federal facilities stop litigating and start complying.

ARGUMENT

I. Because Pervasive Defiance From Federal Agencies Has Thwarted Congressional Plans To Comprehensively Control Hazardous Waste And Water Pollution, Congress Has Enlisted The States' Assistance By Providing Them With The Enforcement Mechanisms Necessary To Force Federal Agency Cooperation.

A. RCRA And The Clean Water Act Establish Comprehensive Programs To Abate Dangerous Chemicals And To Purify The Nation's Water. All Persons, Including Federal Agencies, Are Required To Do Their Share To Safely Handle Their Hazardous Wastes And To Restore The Usefulness Of The Water By Controlling Their Own Pollution.

When enacting RCRA, Congress was primarily concerned about the unsafe management and disposal of hazardous waste. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 6241. Citing

numerous examples of groundwater pollution, fish kills, wildlife and livestock kills, and human poisonings, the House found that these wastes can "blind, cripple or kill . . . defoliate the environment, contaminate drinking water supplies and enter the food chain." H.R. Rep. No. 1491 at 11, 17-23, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6249, 6254-61. *See* also, S. Rep. No. 988, 94th Cong., 2d Sess. 3 (1976). Congress established a comprehensive, nationwide program to control these dangerous chemical wastes from creation to ultimate disposal (known as "cradle-to-grave"). S. Rep. No. 988 at 3; H.R. Rep. No. 1491 at 11, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6249.

Congress was particularly concerned about hazardous waste mismanagement at more than twenty thousand facilities owned by the federal government. H.R. Rep. No. 1491 at 46, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6284. Because Congress realized that a comprehensive program would be ineffective without the cooperation of federal facilities, Congress wanted federal facilities to "provide national leadership in dealing with solid waste and hazardous waste disposal problems." S. Rep. No. 988 at 24.

The Federal Water Pollution Control Act, as amended by the Clean Water Act (hereinafter both referred to as Clean Water Act), similarly established a comprehensive system to protect the public from harmful wastes. The Clean Water Act has as its objective the restoration of "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Congress intended to restore and protect these waters to the fullest extent possible under the Commerce Clause. *Quivira Mining Co. v. U.S. EPA*, 765 F.2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986).

Therefore, Congress required the U.S. Environmental Protection Agency ("EPA") to develop "*comprehensive* programs for preventing, reducing, or eliminating the pollution of navigable waters" (emphasis added) in order to protect the water for fish, aquatic life, wildlife, recreation, drinking water, agriculture, industry, and other purposes. 33 U.S.C. 1252(a). In fact, the goal of the Clean Water Act was

to *eliminate* all pollution discharges into navigable waters by 1985. 33 U.S.C. 1251(a)(1).

Although Congress assigned U.S. EPA the initial task of formulating comprehensive pollution control programs, the States were expected to assume the burden of implementing both the water pollution and hazardous waste programs. 33 U.S.C. 1251(b); 42 U.S.C. 6902(a)(1),(7). This state implementation was to be accomplished through U.S. EPA's authorization of States to administer and enforce the programs. 33 U.S.C. 1342(b); 42 U.S.C. 6926.

The purposes of these comprehensive water pollution and hazardous waste programs are undermined when only some polluters responsibly control their wastes. Therefore, Congress, in an exercise of fairness, assigned a share of responsibility to all waste producers, including corporations, individuals, municipalities, counties, states, and federal agencies. Congress' intent to make these programs comprehensive is dramatized by the fact that a federal agency is excused from compliance only where a Presidential exemption has been obtained for national security or other "paramount" national interests and has been reported to Congress. 33 U.S.C. 1323(a); 42 U.S.C. 6961. Unfortunately, the federal entities expected to provide national leadership in these efforts (S. Rep. 988 at 24) have refused to do their share.

B. Because Federal Agencies Have Exploited Sovereign Immunity As A Shield For Their Pollution Practices, Congress Has Broadly Removed Sovereign Immunity As A Defense In The Field Of Pollution Control.

While Congress was considering the 1972 water pollution control amendments, it found that federal agencies had not been doing their share to abate pollution under the previous federal water pollution statutes. The Senate described the problems the nation was having with polluting federal agencies:

> Evidence reviewed in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute.

S. Rep. No. 414, 92d Cong., 2d Sess. 67 (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 3733-34.

The House noted the same problems:

> The Committee, after hearing of numerous examples of flagrant violation of pollution controls is determined that the Federal facilities shall be a model for the nation . . . .

H.R. Rep. No. 911, 92d Cong., 2d Sess. 188 (1972).

Due to its dissatisfaction with the noncompliance record of federal facilities, Congress included 33 U.S.C. 1323 in the 1972 amendments. This section waived immunity for state water pollution laws as well as federal laws. Such a waiver was essential, since the act gave the States the primary role in abating water pollution and limited U.S. EPA to a supervisory role. 33 U.S.C. 1251(b). Federal facilities, then, could no longer ignore their water pollution control obligations under either state or federal water law.

However, while considering the Clean Water Act Amendments of 1977, Congress found that "many federal agencies continue to try to evade the mandate of Federal law to comply with all State and local requirements." H.R. Rep. No. 294, 95th Cong., 1st Sess. 199 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News at 1277-78. Furthermore, these agencies were obtaining court decisions exempting them from various water pollution requirements, such as permits, under the guise of sovereign immunity. *Id.* As a result, Congress amended 33 U.S.C. 1323 to expressly authorize

sanctions against federal facilities to give them incentive to comply. S. Rep. No. 370, 95th Cong., 1st Sess. 67-68 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 4392-93.

In the meantime, Congress had enacted RCRA in 1976. Upon hearing of continuing widespread federal disregard for the previously enacted water and air laws, H. Rep. No. 1491 at 45, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6283-84, the House actually proposed to relieve the States of the burden of enforcing the hazardous waste program at federal facilities. H. Rep. No. 1491 at 2466, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6262, 6304-05. This bill, which would have placed the burden solely on U.S. EPA, *id.*, was later rejected by Congress in favor of the Senate bill, which imposed the primary enforcement burden on the States. S. Rep. No. 988 at 23-24. Simultaneously, Congress waived all immunity from enforcement of state and federal laws to give federal agencies the incentive to comply.

Unfortunately, even explicit waivers of sovereign immunity have done little to encourage federal agencies to comply. According to the Comptroller General in testimony before a House subcommittee, "inattention and negligence in complying with environmental laws" has contributed to "widespread contamination" at DOE facilities, some of which may be "irreversibly contaminated." Cleanup at Federal Facilities: Hearing on H.R. 765 before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess., ser. 4, at 34, 53 (1989). This contamination has spread off-site at some facilities. *Id.* DOE has estimated that cleanup of hazardous and other wastes at its sites could cost taxpayers between $40 billion to $70 billion during just the next twenty years. *Id.*, at 44.

C. Because This Court In *Hancock v. Train* Equated "Procedural Requirements" With "Enforcement Mechanisms," Congress Waived Federal Agency Immunity For Civil Penalties And Other Enforcement

Mechanisms By Subjecting The Agencies To "All Procedural Requirements."

Rather than complying with the pollution laws, the federal agencies have chosen to aggressively litigate against the laws. This litigation has resulted in a double standard, one exempting federal agencies from the law, and another applicable to private industry, states, and other citizens.

State attempts to control federal pollution through permits ended in federal agency challenges to the waivers of both the Clean Air Act in *Hancock v. Train,* 426 U.S. 167 (1976), and the Federal Water Pollution Control Act in *EPA v. California,* 426 U.S. 200 (1976). Narrowly construing the waivers, the Court ruled that Congress had not waived immunity for permits and other enforcement mechanisms.

At the time the Court considered *Hancock* and *California,* the air and water statutes waived immunity for "requirements." At issue in these cases was whether "requirements" included only *substantive* obligations, or whether "requirements" also included *procedural* obligations such as the procurement of permits. The Court held that Congress did not intend to include permits and other procedural obligations within the meaning of "requirements". *California,* 426 U.S. at 223; *Hancock,* 426 U.S. at 197-98. The Court's distinction between substantive and procedural requirements is important, because Congress had this distinction in mind when writing the current waivers in RCRA and the Clean Water Act.

Before *Hancock,* the Court of Appeals for the Fifth Circuit had phrased the issue in the same fashion, coming to the opposite conclusion. In *Alabama v. Seeber,* 502 F.2d 1238 (5th Cir. 1974), the Fifth Circuit distinguished between substantive duties and enforcement mechanisms in the Clean Air Act, as follows:

> Defendants seek to avoid the impact of §118 by engrafting upon it a *substantive procedural overlay.* They argue that the phrase "requirements

> respecting control and abatement of air pollution" means only requirements such as emission standards and limitations, which they label *"substantive," and does not include mechanisms, e.g., permit systems, for enforcing these requirements.*

(Emphasis added). *Id.*, at 1245. Relying on the wording of the Clean Air Act waiver, the "scheme of the Act as a whole," and "Congressional purpose," the Fifth Circuit held that enforcement mechanisms were requirements. *Id.*, at 1245-47.

Although *Seeber* was vacated due to the subsequent decision in *Hancock*, this Court in *Hancock* phrased the issue in the same fashion by quoting from *Seeber:*

> [T]he question is . . . "whether Congress intended that the *enforcement mechanisms* of federally approved state implementation plans, in this case permit systems, would be" available to the States to *enforce* that duty.

426 U.S. at 183 (emphasis added). The Court rejected the State's contention that Congress had intended to "subject federal facilities to the *enforcement mechanisms*" of State law (emphasis added). *Id.*, at 184. In holding that enforcement mechanisms were not "requirements", the Court repeatedly distinguished between enforcement mechanisms and substantive duties. *Id.*, at 182-98. In fact, the Court's opinion uses "enforcement mechanisms" and derivatives of "enforce" no fewer than thirty-one times when discussing "procedural requirements."

Similarly, *EPA v. California* referred to water permits as "a means of achieving and enforcing the effluent limitations." 426 U.S. at 205. Noting that the air and water act waivers were "virtually identical" and declaring that *California* was "governed by the same fundamental principles" (*id.*, at 211) as *Hancock*, the Court held that water permits also were not "requirements".

Therefore, just before Congress passed RCRA, the courts had drawn the distinction between substantive requirements on one hand, and enforcement mechanisms or procedural requirements, on the other. The Court also declared that it was "notable" that Congress required federal agencies only to comply with "requirements" instead of requiring compliance with "all" requirements. 426 U.S. at 182.

Congress reacted sharply to these decisions when it passed RCRA in 1976 and amended the Clean Air Act and Federal Water Pollution Control Act in 1977. The House discovered that federal agencies had been invoking sovereign immunity to avoid their air pollution control duties, "including, of necessity, those procedural requirements and *sanctions incidental to implementation and enforcement* of the substantive requirements" which in the committee's view had been mandatory for federal agencies pursuant to the previous Clean Air Act waiver. H.R. Rep. No. 294 at 199, *reprinted in* 1977 U.S. Code Cong. & Ad. News at 1277-78. The House then discussed the *Hancock* decision, stating:

> In the committee's view, the language of existing law should have been sufficient to insure Federal compliance in all of the aforementioned situations. Unfortunately, however, the U.S. Supreme Court construed Section 118 narrowly in *Hancock v. Train* . . . . The new section 113 of the bill is intended to overturn the *Hancock* case . . . .

Id. Congress had a similar adverse reaction to the Supreme Court decision in *California*, commenting:

> The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to *all of the provisions of State and local pollution laws.* Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent.

S. Rep. No. 370 at 67, *reprinted in* 1977 U.S. Code Cong. & Ad. News at 4392 (emphasis added).

Consistent with its original intent to completely waive federal immunity in the air and water statutes, Congress responded to *Hancock* and *California* by writing waivers for both "substantive" and "procedural" requirements into RCRA, the Clean Water Act, and the Clean Air Act. Because the existing court decisions had referred to enforcement mechanisms as "procedural requirements," Congress used this terminology to subject federal facilities to all enforcement mechanisms. Relying heavily on the emphasis in *Hancock* on the use of "all" to accomplish a *complete* waiver, Congress used "all" to describe the requirements waived by all three statutes. Thus, Congress unambiguously effectuated a complete waiver for polluting federal facilities, including *all* enforcement mechanisms. *See* also, *Middlesex Cty. Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 5 (1981) (referring to civil and criminal penalties of the Clean Water Act as "enforcement mechanisms").

More than a decade after Congress responded to *Hancock* and *California* with comprehensive waivers, federal agencies have continued to litigate rather than comply. Now DOE requests that the Court ignore the instructions made to Congress in *Hancock*, in order to again frustrate Congressional intent.

D. Because Penalties Are Necessary To Deter Illegal Activity, Congress Found That Penalties Are An Essential Component Of Its Comprehensive Programs To Reduce And Eliminate Pollution.

The courts have long recognized that civil penalties are an effective mechanism to enforce the law. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *Oceanic Steam Navigation Co. v. Stranaham*, 214 U.S. 320 (1908). A civil penalty will deter the violator from further illegal activity. *ITT*, 420 U.S. at 231-32.

Accordingly, the legislative history of the Clean Water Act shows that Congress regarded civil penalties and other sanctions as indispensable components of its comprehensive water pollution abatement program. In fact, Congress attributed the failure of its pre-1972 water pollution laws in part to the lack of sanctions for noncompliance. S. Rep. No. 414 at 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 3730-31. As the Senate observed, if illegal conduct is to be prevented, "the threat of sanction must be real, and enforcement provisions must be swift and direct." *Id.* The U.S. EPA Administrator at the time, William Ruckelshaus, testified that the penalties in the 1972 House bill were necessary to make U.S. EPA's authority "meaningful." H.R. Rep. No. 911 at 161.

Congress saw a similar need for penalties to deter illegal hazardous waste activities. During Congress' consideration of RCRA in 1976, the Department of Justice endorsed civil and criminal penalties as necessary to enforce the law. H.R. Rep. No. 1491 at 83-84, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6321.

Due to the need for enforcement, Congress has generally provided both criminal and civil penalties to enforce its environmental statutes, including the Clean Water Act and RCRA. Furthermore, where a State is authorized to administer the federal pollution control program under either of these statutes in lieu of the federal government, it is a *mandatory* prerequisite of federal law that these States first enact criminal and civil penalty provisions to enforce these programs.

When violators cannot be penalized for past misconduct, they will violate the law with no fear of punishment unless and until a lawsuit is filed and an injunction is issued. This sorry reality was Congress' motivation for insisting that penalties be used to encourage voluntary compliance by all, including federal, polluters.

Pursuant to this authority, the federal government "routinely" assesses civil penalties against municipalities and

state agencies for violations of the pollution laws. H.R. Rep. No. 111, 102d Cong., 1st Sess. 13 (1991). In fact, the federal government has penalized state agencies and local governments in 49 of the 50 states. *Id.*

In contrast, the federal executive branch has waged a campaign t have the civil penalty provisions of both federal and state environmental statutes declared inapplicable to federal facilities. This strenuous effort by federal agencies shows their distaste for being penalized, which is precisely why civil penalties are an effective means to finally obtain their compliance with the law.

Congress' application of penalties to federal facilities, besides protecting the health and property of nearby citizens, is also cost-effective. The infrequent penalties paid to guarantee compliance are dwarfed by the staggering cleanup costs occasioned by illegal spillage and dumping. In the usual situation where the mere threat of a penalty convinces a facility to comply, the taxpayers pay for neither a penalty nor a cleanup project. Had federal agencies not been complacent in their ability to persuade the courts to void Congressional penalty waivers, they would have implemented cost-effective safety measures to comply with the law and the multi-billion dollar national cleanup crisis would have been substantially avoided.

A penalty's deterrent effect on a federal agency stems partly from its loss of the money. Where the agency pays the penalty from its own account, the agency loses the money. Loss to the agency occurs even where its funds are transferred to another account in the federal Treasury pursuant to a citizen suit, since the penalized agency has no access to that account. Contrary to DOE's statement that Congress could not have intended to shift funds from one Treasury account to another (DOE Br. 33, 42), this is exactly what Congress intended. The most effective monetary deterrent results from payment of the penalty to a state, since the federal government loses the money altogether.

Of even greater deterrent than the loss of funds is the penalty's public declaration that the penalized agency has been punished for violating the law. The penalty focuses attention on the wayward agency by the public, the executive branch and Congress, which will hopefully make inquiries into the agency's behavior and take steps to remedy it. The publicity generated by this undesired attention will convince other federal agencies to comply with the law in the same manner as responsible state and private entities.

This undesired attention occurs whether the penalty is paid from an agency account or the Judgment Fund. It also occurs whether the money is paid to a State or to another federal Treasury account pursuant to a citizen suit.

Although larger penalties generate more adverse publicity and Congressional attention, even a small penalty against a federal agency ordinarily invites public scrutiny due to the identity of the violator. In fact, a Congressional Budget Office study has shown that, even where there is undisputed state authority to penalize federal agencies (e.g., under the Clean Air Act waiver), these penalties have not been "substantial." H.R. Rep. No. 111 at 13-14. Taking the allegations of the complaint as true in the case at bar, the penalty to be paid by DOE for its 35,205 days of state law violations amounts to only $7.10 per day of violation. Therefore, where the courts enforce Congress' penalty waiver, the States have found that small penalties frequently generate federal compliance.

DOE encourages the Court to read holes into the waivers of immunity of RCRA and the Clean Water Act.[2] Acceptance

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[2] DOE has lodged with the Court a DOE statement on H.R. 2194 and S. 596, arguing that the statement describes issues Congress should consider before waiving immunity. DOE Br. 39, n. 34. This statement was a self-serving DOE attempt to boost its image and to persuade Congress to weaken the RCRA waiver. DOE's statement contends it should be exempt from penalties because the Department had a "late start" towards developing technology for treatment of radioactive hazardous waste. However, DOE's "late start" towards RCRA compliance resulted from its refusal to acknowledge that RCRA applied in any fashion to any of its activities, until it lost the argument in a lawsuit. *Legal Environmental Assistance Foundation v. Hodel*, 586 F.Supp. 1163 (E.D.

of DOE's invitation would do more than let DOE escape retribution for its disgraceful conduct - it would also repudiate the language of both statutes and defeat Congress' intent to comprehensively stop hazardous waste and water pollution, including costly, federally sponsored pollution.

E. Because The Department Of Justice Prohibits The U.S. Environmental Protection Agency From Suing Sister Federal Agencies For Illegal Activities, The States Must Be Allowed To Utilize The Civil Penalty Deterrent Provided By Congress To Enforce The Law At Federal Facilities.

The inability of U.S. EPA to enforce the pollution laws against its sister agencies underscores the need for state enforcement. Under Department of Justice policy, U.S. EPA is not allowed to file suit against other federal agencies. Rothmel, *When Will The Federal Government Waive The Sovereign Immunity Defense And Dispose of Its Violations Properly?*, 65 Chi.-Kent L. Rev. 581, 581-82 & n. 6 (1990). As a result, former U.S. EPA Assistant Administrator J. Winston Porter testified before a House committee that U.S. EPA had been forced to rely on "jawboning" federal agencies in attempt to obtain compliance. H.R. Rep. No. 111 at 17.

Therefore, in the absence of U.S. EPA lawsuits, the states are left to conduct enforcement at federal facilities. It is thus essential that the States be allowed to utilize the civil penalty

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[2] *(footnote 2 cont.)*
Tenn. 1984). The delay in development of treatment technology was caused by DOE's "late start," and at any rate, did not justify DOE's past practices of simply dumping the waste in the meantime. Furthermore, Section 1006(a) of RCRA, 42 U.S.C. 6905(a), exempts DOE from RCRA liability whenever RCRA standards are inconsistent with radiological safety precautions. DOE also may apply to U.S. EPA for variances on land ban wastes for which it has no technology. Long ago, Congress made the judgment that the public interest would be served by a broad waiver, with minor exceptions such as Section 1006(a). At the present time, neither the House nor the Senate has seen fit to adopt the penalty exemptions proposed by DOE.

deterrent Congress intended them to use against uncooperative federal agencies.

II. The Rules Of Statutory Construction Applicable To Penal Laws And Waivers Of Sovereign Immunity Respect The Intent Of Congress, Rather Than Utilizing An "Especially Rigorous Application" Of Strict Construction Dependent On The Invention Of Strained, Improbable Meanings For The Statutes.

DOE proposes a new rule of statutory construction which would not only threaten the majority of Congress' waivers, but would also impede enforcement of criminal and other penal laws at federal facilities. DOE advocates an "especially rigorous application" (DOE Br. 17) of strict construction, arguing that a "particularly clear statement" is required for monetary waivers and penal statutes. In its petition for rehearing below, DOE represented that the decisions of this Court require a waiver to "be so clear and unequivocal as to admit no other possible construction." R. 11, p. 2. DOE's proposed rule would not only change the courts' approach to monetary claims under the Torts Claim Act and other statutes, but would also hinder enforcement against crimes and other penal offenses at federal facilities. As explained below, neither the penal nor waiver decisions of this Court call for an added measure of strictness in this case.

A. When Applying Strict Construction To Penal Laws And Waivers Of Sovereign Immunity, The Court Has Drawn Upon The History And Purpose Of The Legislation To Determine Legislative Intent.

Rather than reading a statutory excerpt in isolation or out of context, *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 285 (1956), the Court has looked for guidance to "the whole law, and to its object and policy." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). The Court does not depart from this principle even when determining

the rights of the United States. *Richards v. United-States*, 369 U.S. 1, 11 (1962).

In construing a penal water pollution statute in *United States v. Standard Oil Co.*, 384 U.S. 224 (1966), the Court stated that strict construction is no substitute for "common sense, precedent, and legislative history." *Id.*, at 225. The Court's opinion emphasized that the Court would not construe the criminal statute "in a vacuum" nor would the Court adopt a "narrow, cramped reading" which would result in a "partial defeat" of the statute's purpose. *Id. See* also, *United States v. Braverman*, 373 U.S. 405, 408 (1963) (criminal statute construed in light of economic ills motivating passage of the law).

The same principle governs waivers of sovereign immunity. While discussing "the immunity enjoyed by the United States as territorial sovereign," the Court explained the necessity of gauging Congressional sentiment:

> The outlook and feeling thus reflected are not merely relevant to our problem. They are important . . . . A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process.

National City Bank of New York v. Republic of China, 348 U.S. 356, 359-60 (1955). *See* also, *United States v. Yellow Cab Co.*, 340 U.S. 543, 550 (1951) (recognizing Congressional intent to broadly waive federal tort immunity in order to reduce private bills for relief in Congress).

In the case at bar, the Court should interpret the waivers of sovereign immunity in a manner which effectuates Congress' comprehensive plans to control all hazardous waste and water pollution. Exemptions for federal agencies would defeat this Congressional objective.

B. When Construing Penal Statutes And Waivers Of Sovereign Immunity, The Court Has

Interpreted Their Terms According To Their Plain And Ordinary Meaning.

When interpreting waivers, the Court has usually assumed that legislative purpose is expressed by the "ordinary meaning" or "common usage" of the statutory words. *Kosak v. United States,* 465 U.S. 848, 853 (1984); *Yellow Cab Co.,* 340 U.S. at 548. The Court applies the same principle of common usage to penal laws, assigning the "fair meaning" to disputed terms. *United States v. Cook,* 384 U.S. 257, 263 (1966). Therefore, the Court has rejected efforts by litigants to exercise "ingenuity to create ambiguity" in the plain terms of a waiver. *United States v. James,* 478 U.S. 597, 604 (1986).

C. Strict Construction Does Not Assign The Narrowest Possible Meaning To Penal Laws And Immunity Waivers, Especially Where These Statutes Are Enacted In Broad, Sweeping Terms.

Strict construction is not used to create ambiguity in a statute "as an overriding consideration of being lenient to wrongdoers." *United States v. Turkette,* 452 U.S. 576, 587, n. 10 (1981). Therefore, the Court does not assign penal statutes their "narrowest possible meaning" in disregard of Congressional intent. *United States v. Bramblett,* 348 U.S. 503, 510 (1955). Accord, *Cook,* 384 U.S. at 262. Instead, penal statutes are given their "fair meaning" in accord with the evident intent of Congress, *Cook,* 384 U.S. at 262-63, even where the statute speaks in "broad, absolute terms." *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 550 (1961).

Similarly, immunity waivers must be sensibly construed according to their literal language. On various occasions, the Court has quoted the following statement from a decision by Judge Cardozo:

> The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement

> of construction, where consent has been announced.

Kosak, 465 U.S. at 853, n. 9; *Yellow Cab*, 340 U.S. at 554.

The Court does not assume the authority to narrow a waiver intended by Congress. *Bowen v. City of New York*, 476 U.S. 467, 479 (1986); *United States v. Kubrick*, 444 U.S. 111, 118 (1979). While the Court should not promote extravagance by "careless construction" of waivers, neither should it "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

Congressional intent to broadly waive immunity must not be "thwarted by an unduly restrictive interpretation." *Canadian Aviator v. United States*, 324 U.S. 215, 222 (1945). The courts may not whittle down a broad waiver by resorting to a review of legislative history or other refinements. *Yellow Cab.*, 340 U.S. at 549-50.

D. When Applying The Rule of Strict Construction, The Court Has Refrained From Creating Or Enlarging Exceptions To Penal Laws And Waivers Of Immunity.

The Court has refrained from using "strained and technical constructions" to create exceptions to or loopholes in penal statutes. *Kordel v. United States*, 335 U.S. 345, 349 (1948). Similarly, strict construction will not be utilized to enlarge the exceptions expressly written in a clear and sweeping waiver of immunity. *United States v. Muniz*, 374 U.S. 150, 166 (1963); *Yellow Cab*, 340 U.S. at 548, n. 5, 549 (disapproving "fine distinctions" between claims to exempt some claims from the waiver). Exceptions to a waiver should not be "broadly construed," because "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." *Kosak*, 465 U.S. at 853, n. 9. The courts' proper objective is to identify the circumstances within the words and reason of the exceptions, "no less and no more." *Id.*

E. Congress Is Not Required To Specifically Spell Out Each And Every Federal Action Included In A Penal Statute Or Immunity Waiver.

Strict construction does not force Congress into a straitjacket of specificity when writing waivers of sovereign immunity. *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174 (1988), construed a waiver which categorically subjected federal entities to workers' compensation laws "to the same extent" as such laws are applied to private facilities. *Id.*, at 185. The Court found that this waiver authorized supplemental awards similar to penalties for the violation of state safety regulations even though supplemental awards were not expressly listed in the waiver. *Id.*, at 183-84.

Similarly, when construing the waiver for "any claim . . . on account of personal injury" in the Torts Claims Act, the Court found that Congress had waived immunity for each and every claim not expressly exempted by the Act. *Yellow Cab,* 340 U.S. at 548-50. The Court rejected the government's claim that the statute was not "sufficiently specific." *Id.*, at 555.

If Congress attempted to list each item or activity subject to waiver, instead of broadly categorizing them, Congress would inevitably miss specific items intended for inclusion. Insisting on itemization as a condition of waiver would thus defeat the intent of Congress.

F. Contrary To DOE's Position, The Decisions Of This Court Do Not Authorize An "Especially Rigorous Application" Of Strict Construction To Penalty Waivers.

As support for its rule of "especially" strict construction, DOE relies on *Lehman v. Nakshian,* 453 U.S. 156 (1981) and *Missouri Pac. R.R. v. Ault,* 256 U.S. 554 (1921). DOE Br. 16. According to DOE, *Lehman* requires a "particularly" clear waiver when it "affects the public fisc." DOE Br. 16. However, not even a generous reading of that case discloses a

command to interpret monetary waivers more harshly than other waivers.[3]

DOE's dependence on *Ault* to defeat general Congressional penal waivers also finds no support in the case. Although the statute in *Ault* broadly waived immunity for "all laws and liabilities as common carriers", the statute added a proviso "except in so far as may be inconsistent . . . with any order of the President." 256 U.S. at 558. The Director General of Railroads, acting as the President's representative (*id.*, at 556), had issued an order exempting the federal government from fines and penalties (*id.*, at 564). Thus, it was the President's order which preserved sovereign immunity in *Ault*, not a narrow judicial interpretation of the statute's sweeping waiver language. Any contrary holding would be contrary to subsequent decisions in *Goodyear Atomic, supra,* and *Yellow Cab, supra,* effectuating broad Congressional waivers.

DOE's proposed rule of especially strict construction violates the commands of this Court described in Argument II(A)-(E) above. In rejecting a past attempt by a litigant to narrowly construe a penalty statement in such a fashion, the Court once noted:

> [It is] "easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms as to preclude the exercise of ingenuity in raising doubts about its construction."

Northern Securities Co. v. United States, 193 U.S. 197, 359-60 (1904). The Court should reject DOE's efforts to defeat Congressional purpose by attributing strained, improbable

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[3] While most of the immunity cases cited by the State and DOE construe waivers requiring the expenditure of federal funds, only one espouses the "especially" narrow construction urged by DOE. This sole exception is *Library of Congress v. Shaw,* 478 U.S. 310 (1986), which applies a special "no-interest rule" to provide "an added gloss of strictness" to interpretation. *Id.*, at 318. This standard applies only to waivers for interest, *Missouri v. Jenkins,* 491 U.S. 274, 281, n. 3 (1989).

meanings to the waivers in RCRA and Clean Water Act.

III. The Court Of Appeals Below Correctly Held That Ohio's Civil Penalties Arise Under Federal Law, Since Ohio's Water Pollution Prevention Program and Penalties Originated From The Clean Water Act.

A. As Commonly Used, And As Used In The Clean Water Act, The Term "Sanctions" Includes Civil Penalties.

To stem the flow of federal water pollution, Congress amended the federal facilities section of the Clean Water Act in 1977. This section now provides in pertinent part as follows:

> (a) *Each department,* agency, or instrumentality . . . of the Federal Government . . . *shall be subject to,* and comply with, *all Federal, State,* interstate, and local requirements, administrative authority, and process and *sanctions* respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply . . . (C) *to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.*
>
> No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the *United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court* . . . .

33 U.S.C. 1323 (emphasis added).

The first sentence makes it evident that departments and agencies of the executive branch are subject to *all* federal and state sanctions. Subdivision (C) of the second sentence shows that federal entities are subject to *any* federal and state sanctions. The only exception to this all-inclusive waiver for sanctions is the last sentence quoted above. Significantly, the last sentence specifically exempts federal *officers* from civil penalties for official duties, an exemption which would be unnecessary if the previous language of the section had not already waived liability for civil penalties.

Therefore, federal agencies are subject to civil penalties if civil penalties are a form of sanction in the plain and ordinary usage of that word. In order to ascertain the plain and ordinary meaning of a word, the courts frequently rely upon the use of dictionary definitions. *Cf, Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 199 fn. 20 (1976).

Black's Law Dictionary defines "sanction" as:

> . . . That part of a law which is designed to secure enforcement *by imposing a penalty for its violation* . . .

Black's Law Dictionary 1341 (6th ed. 1990). *Ballentine's Law Dictionary* (3rd ed. 1969) at 1137 further states that a sanction is " . . . the imposition of any form of penalty or fine." Thus, the common usage of "sanction" describes a penalty imposed on a violator of the law.

Even the Department of Justice uses the word "sanction" to describe penalties or punishment. The Department, in its comments on the 1976 RCRA legislation, used the terms "sanctions" and "penalties" interchangeably in characterizing civil and criminal penalties under both RCRA and the Clean Water Act. H.R. Rep. No. 1491 at 83-84, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6321. *See also,* the testimony of U.S. EPA's Administrator on the 1972 water pollution legislation, in which he refers to criminal and civil penalties as "enforcement sanctions." H.R. 911 at 161.

The Court has also referred to penalties or fines as sanctions, including the penalties and fines imposed pursuant to the Clean Water Act and the Clean Air Act. *See Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 53 (1987); *United States v. Ward*, 448 U.S. 242, 249 (1980); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 282 (1978). Thus, the courts, as well as Congress, U.S. EPA, and the Department of Justice, commonly use the term "sanctions" to describe civil penalties.

The legislative history confirms Congress' complete waiver in the Clean Water Act. The Senate committee report declares that federal facilities are "subject to all of the *provisions* of State and local pollution laws." (Emphasis added). S. Rep. No. 370 at 67, *reprinted in* U.S. Code & Ad. News at 4392. Civil penalties are provisions of state law.

In addition to the district court and court of appeals below, two courts have held that "sanctions" in 33 U.S.C. 1323 include civil penalties. *Sierra Club v. Lujan*, 931 F.2d 1421, 1425 (10th Cir. 1991); *Metropolitan Sanitary Dist. v. U.S. Dept. of Navy*, 722 F.Supp. 1565, 1570 (N.D. Ill. 1989). Both courts rejected the position advocated by DOE in the case at hand, that the meaning of "sanction" is limited by the meaning of "process". DOE Br. 19-21. As noted in *Lujan*, this interpretation contradicts the meaning ascribed by Congress to the same words in the Clean Air Act waiver upon which 33 U.S.C. 1323 is based. 931 F.2d at 1428; H.R. Rep. No. 294 at 200, *reprinted in* 1977 U.S. Code Cong. & Ad. News at 1279.

DOE's view that "process" limits "sanctions" to enforcement of a court order is also contrary to the ordinary meaning of "process." "Process" is not limited to court orders, but "as now commonly understood" refers to a summons, complaint and "all the acts of a court from the beginning to the end of its proceedings." Black's Law Dictionary 1205 (6th ed. 1990). *See* also, *Girardier v. Webster College*, 563 F.2d 1267, 1272-73 (8th Cir. 1977). A court uses its process to assess a penalty, starting with the complaint and summons. Therefore, even if DOE's "narrowest" of

interpretations were applicable to the waiver, the waiver still authorizes penalties.

Similarly narrow and unfounded is DOE's contention that "any . . . sanction" refers only to a singular type of legal authority. DOE Br. 21. Congress' use of "any", rather than denoting a singular connotation, has a broad application. *James*, 478 U.S. at 605. Congress' use of "all . . . sanctions" at an earlier point in the waiver also contradicts DOE's interpretation.

Finally, DOE argues that the Senate committee report did not expressly mention "penalties". DOE Br. 24, n. 18. However, the Senate not only wrote that federal agencies are subject to all state and local water pollution "provisions" (S. Rep. No. 370 at 67), but followed the waiver for sanctions with a limitation on civil penalties in the "arising under" sentence. The Court should apply the ordinary, intended meaning to this waiver rather than straining to adopt DOE's narrow interpretation.

B. Because Ohio's Penalties Originate Under, Are Mandated By, And Are Approved Under The Clean Water Act, They Are Penalties "Arising Under Federal Law" As That Phrase Is Used In The Federal Facilities Waiver.

A clause in 33 U.S.C. 1323 provides that federal agencies are liable "only for those civil penalties arising under Federal law . . . . " This clause, being an exception to the broad waiver expressed in the previous sentences of the section, must not be construed in an "unduly generous" fashion which runs the risk of defeating the central purpose of the statute. *Kosak*, 465 U.S. at 853, n. 9. Therefore, the "arising under" exception must not defeat the comprehensive nature of Congress' water pollution program or discourage federal agencies' compliance with that program.

"Arising under" Federal law is not the same as *conversion* into Federal law. "Arise" means to "originate" or "come into being." *Webster's New World Dictionary*, 2d ed. (1978).

As held by the courts below, Congress meant to restrict penalties to those imposed by federally approved water pollution programs. DOE Pet. App. 6a-8a, 42a-43a. Accord, *Metropolitan Sanitary District*, 722 F.Supp. at 1572. A State may obtain penalties only if its penalties are part of an authorized program, so that the State steps into the shoes of U.S. EPA to enforce the federal water pollution program. This clause also precludes municipalities and other local governments, if their programs are unauthorized, from imposing unapproved penalties on the federal government. E.g., *see Metro. Sanitary Dist. Of Greater Chicago v. United States*, 737 F.Supp. 51, 52 (N.D. Ill. 1990) (dismissal of penalty claims of local sewer district which, unlike Ohio, lacked federal approval for its penalties).

In 33 U.S.C. 1342(b), Congress authorized the States to implement the Clean Water Act by administering the federal water pollution program. The Clean Water Act specifically requires the State to abate violations through civil penalties and other enforcement mechanisms. The state permit program must be implemented "in accordance with" 33 U.S.C. 1342. 33 U.S.C. 1342(c)(2). The State then implements the Section 402 permit program *on behalf of and in lieu of U.S. EPA*. 33 U.S.C. 1342(c)(1). U.S. EPA can disapprove any permit issued by the State. 33 U.S.C. 1342(d)(2). Compliance with the state permit constitutes compliance with the Clean Water Act. 33 U.S.C. 1342(k). As the court of appeals below aptly noted, compliance with federally approved state law *is* compliance with the Clean Water Act. DOE Pet. App. 7a. Therefore, the entire permit program, including its civil penalty provisions, originates or arises from federal law.

Approved state programs thus *replace* federal implementation of the Clean Water Act. Adding to the federal character of the permits issued by States under approved programs is the fact that U.S. EPA can directly enforce the permits *as federal requirements*. 33 U.S.C. 1319(a). Therefore, the State is enforcing the same permit enforced as federal law by U.S. EPA, and citizens under 33 U.S.C. 1365.

As the court below noted, the introductory section of the Clean Water Act makes it clear that state permit programs arise *under* federal law by declaring:

> It is the policy of Congress that the *States* . . . implement the permit programs *under* sections 402 and 404 of this Act.

33 U.S.C. 1251(b) (emphasis added). On fourteen other occasions, Congress refers to a "permit issued *under* Section 402 of this Act . . . *by a State*" (emphasis added) or uses similar language. 33 U.S.C. 1314(g); 33 U.S.C. 1314(i)(1); 33 U.S.C. 1314(i)(2); 33 U.S.C. 1319(a)(1); 33 U.S.C. 1319(a)(3); 33 U.S.C. 1319(c)(1)(A); 33 U.S.C. 1319(c)(1)(B); 33 U.S.C. 1319(c)(2)(A); 33 U.S.C. 1319(c)(2)(B); 33 U.S.C. 1319(c)(3)(A); 33 U.S.C. 1319(d); 33 U.S.C. 1319(g); 33 U.S.C. 1342(a)(3); 33 U.S.C. 1342(c)(2).

The legislative history of the Clean Water Act similarly indicates that the State's permit program arises from federal law. The House report for the 1972 Act describes state permits as permits "issued . . . under Section 402" or issued "pursuant to" Section 402. H. R. Rep. No. 911 at 100, 120. The same report, in describing both State and U.S. EPA roles in the permit program, referred to "this program." H. R. Rep. No. 911 at 125. That is, there is only one program under federal law, and an authorized State administers it.

The conference report uses language consistent with that of the House report while explaining Section 402, stating:

> The conferees intend that the Administrator (or a *State) shall include in any permits issued under Section 402* (or shall require a *State to include in any permits issued under 402),* where appropriate, a schedule of compliance . . . . "

Conf. Rep. No. 1236, 92d Cong., 2d Sess. 140 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 3818 (emphasis added).

Because Congress regarded civil penalties as an essential part of the permit programs arising under the Clean Water Act, 33 U.S.C. 1342(b)(7) makes assessment of penalties mandatory for authorized state programs. According to the U.S. EPA regulations implementing 33 U.S.C. 1342, penalty assessment is a prerequisite for obtaining and keeping authorization of an NPDES program. 40 C.F.R. 123.27(a)(3). In fact, to meet U.S. EPA's programmatic requirements, a state's civil penalty authority must be $5,000 per day or higher. 40 C.F.R. 123.27(a)(3)(i). U.S. EPA's rules specifically mandate that penalties be imposed in "appropriate" amounts. 40 C.F.R. 123.27(c). Since assessment of civil penalties is a mandatory function of the NPDES permit program administered on behalf of the federal government, Congress regarded these civil penalties as arising under federal law.

Pursuant to 33 U.S.C. 1342 and 40 C.F.R. Part 123, Ohio has created an NPDES permit program to implement the Clean Water Act. Because the program did not exist until the Clean Water Act called for its formulation, Ohio's permit program truly "arises under" federal law. Ohio Revised Code Section 6111.03(J) provides the mechanism for the Ohio EPA Director to "[i]ssue, revoke, modify, or deny permits . . . in compliance with all requirements of the 'Federal Water Pollution Control Act' . . . . " The Director is not allowed to issue a permit to which U.S. EPA objects. O.R.C. 6111.03(J)(3).

O.R.C. 6111.03 commands state officials to administer Ohio's water pollution code "in the same manner that the 'Federal Water Pollution Control Act' is required to be administered." Therefore, contrary to DOE's assertion (DOE Br. 27), Ohio's water pollution issues will not be "resolved in substantially different ways" under state and federal law. By virtue of 40 C.F.R. 123.27(a)(3)(i), Ohio's maximum $10,000 per day civil penalty is also consistent with the Clean Water Act. In addition, Ohio EPA permits must attain compliance with "national effluent limitations, national standards of performance for new sources, and national toxic and pretreatment effluent standards" set by U.S. EPA under the Clean Water Act. O.R.C. 6111.03(J). Ohio EPA permits also

must, where necessary, impose "water quality related effluent limitations in accordance with sections 301, 302, 306 and 307 of the 'Federal Water Pollution Control Act' . . . . " O.R.C. 6111.03(J). O.R.C. Chapter 6111 contains no fewer than 33 references to the federal act in authorizing Ohio EPA to implement it.

Ohio Revised Code Section 6111.09 provides the mechanism to assess civil penalties against any "person" which violates an NPDES permit. Federal departments are included within the definition of "person", O.R.C. 6111.01(I), which in turn may be penalized pursuant to O.R.C. 6111.09. Both this definition and the penalty section were approved by U.S. EPA as part of Ohio's program. By virtue of U.S. EPA's authorization, these penalties against federal agencies arise under federal law.

DOE postulates that federal approval of Ohio's permit program and penalties does not convert Ohio's penalties into federal law. However, neither the State nor the decision below have contended that O.R.C. 6111.09 has been *converted* into a federal law. Instead, O.R.C. 6111.09 penalties have arisen under, i.e., *originated or come into being under,* federal law. Similarly, the citations of legislative history provided in DOE's brief simply mentions that state programs remain state law rather than being converted into federal law. These citations do not contradict the State's position that the penalties originate under federal law. Congressional statements about permits issued "under state law" are also consistent with the many statements in the Clean Water Act about state permits issued under federal law, since approval of the State's program and its substitution for U.S. EPA administration of the Act causes the permits to be issued under both state and federal law.

Similarly flawed is DOE's reliance on caselaw pertaining to the courts' exercise of federal question jurisdiction pursuant to 28 U.S.C. 1331. In *International Ass'n. of Machinists v. Central Airlines,* 372 U.S. 682 (1963), a private contract containing federally mandated conditions was held to "arise under federal law." The Court found that the contract

terms were derived from the federal statute and its policy. *Id.*, at 690-91. Thus, the contract depended on the federal statute for "power and authority" even though private action was necessary to implement its federal purpose. *Id.*, at 692.

Like the contract terms in *International Machinists*, O.R.C. 6111.09 penalties have their source in the authority of the Clean Water Act and its policy. Although the enactment of state law is necessary to draw upon this "power and authority", Ohio penalties still arise under federal law by virtue of their origin and the pervasive federal involvement in their approval and implementation.

However, while the Court could find that Ohio penalties "arise under federal law" under the principle of *International Machinists*, reliance on jurisdictional caselaw is unnecessary to decide the meaning of this phrase as intended in 33 U.S.C. 1323. The Clean Water Act waiver is the product of its own specific purpose and history, and thus must be construed consistently with the circumstances surrounding its enactment. On the other hand, the interpretations of 28 U.S.C. 1331 are the result of that statute's distinct purpose and history. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (1983). In fact, Article III of the Constitution, containing the same phrase as 28 U.S.C. 1331, has been construed differently due to the differences in its history and policy. *Id.* In *Citronelle-Mobile v. Gulf Oil Corp.*, 591 F.2d 711, 715 (Temp. Emerg. Ct. App. 1979), cert. denied, 444 U.S. 879 (1979), another federal statute providing "arising under" jurisdiction was interpreted in a third manner due to its distinct background and context.

Federal question jurisdiction implements Congress' policy to protect federal statutes from hostile state courts, as well as to apply the expertise of the federal judiciary to issues of federal law. In contrast, the phrase "arising under federal law" in 33 U.S.C. 1323 was enacted in an entirely different context. Rather than being concerned about destruction of federal statutes by state courts, Congress meant to encourage compliance with comprehensive, federally approved water pollution programs while shielding federal

agencies from unauthorized penalties. The use of "arising under" must be examined in light of expressed Congressional intent to enforce federal facility compliance with the Act, an objective which has not been, and cannot be, accomplished without the penalty deterrent.

Ohio has not sought independent federal question jurisdiction for its state penalty claims, nor does the State seek a holding which will expand federal question jurisdiction. In fact, while Ohio asserts *waiver* under 33 U.S.C. 1323, the State's complaint asserts federal court *jurisdiction* for the state claims only as pendent claims. J.A. 5. The State seeks to exercise a waiver provided by Congress as essential assistance in operating a federally mandated and approved program. The Court should not interpret the "arising under" exception in a fashion which defeats this purpose. *Kosak, supra.* In light of the ordinary meaning of "arise," the repeated statutory and legislative history references to state permits "under" the Act, the substitution of Ohio's program for the Administrator's, and U.S. EPA's approval of O.R.C. 6111.09 penalties against federal agencies, the Court should hold that Ohio's penalties arise under federal law.

IV. The Citizen Suit Provision Of The Clean Water Act Also Authorizes Civil Penalties Against Federal Facilities For Violating This Law.

The provision in 33 U.S.C. 1323 is not the only waiver of sovereign immunity in the Clean Water Act.[4] In 1972,

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[4] In its court of appeals brief, DOE argued that only 33 U.S.C. 1323, and not 33 U.S.C. 1365, is a waiver of sovereign immunity. R. 2, pp. 33-34. To DOE's credit, it thus far has not repeated the same argument to this Court. Moreover, it should be noted that, in *EPA v. California*, the federal government contended the opposite: that only 33 U.S.C. 1365 is a waiver. The federal agencies in that case argued that states, as citizens under that section, could file citizen suits to fill the loophole left by federal refusal to obtain state permits. In the event DOE's reply brief argues that 33 U.S.C. 1365 is not a waiver, the State has attached the relevant pages of the *EPA* brief in the appendix, *infra*. Cf. *Hancock*, 426 U.S. at 196 (State, under the analogous citizen suit provision in the Clean Air Act, can file suit against federal agencies).

Congress also made it clear that federal facilities are subject to civil penalties in citizen suits pursuant to Section 505, 33 U.S.C. 1365. Subsection (a) of this section provides in pertinent part:

> . . . [A]ny citizen may commence a civil action . . .
>
> (1) against any person (including (i) the United States . . .) . . . . The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under section 309(d) of this Act. [33 U.S.C. 1319].

In 33 U.S.C. 1365(a)(1), Congress expressly defined the United States as a "person" which can be sued. Section 309(d) provides that the courts can assess civil penalties against all "persons". 42 U.S.C. 1319. By incorporating Section 309(d) civil penalty authority in the same section defining the United States as a "person," Congress could not avoid noticing that [illegible]teral language subjects federal entities to penalties.

The waiver in 33 U.S.C. 1365(a) is complemented by the waiver in 33 U.S.C. 1323(a). The latter section subjects federal entities to "all Federal . . . sanctions." "[A]rising under Federal law" confirms the waiver for citizen suit penalties. If Congress had not authorized these penalties against federal entities, there would be no need for these two provisions. Since the Court will not interpret a statute so as to make one part inoperative, *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985), the Court should not make superfluous the two provisions of Section 313 by its interpretation of Section 505.

Although the court of appeals below did not rule on the federal penalty issue,[5] the Court of Appeals for the Tenth

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[5] A federal appellate court may decide an issue not adjudicated below where the proper resolution of that issue is clear. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). If the Court reverses the court of appeals' decision on state water pollution penalties, the Ohio/DOE stipulation

Circuit has held federal agencies subject to citizen suit penalties. *Sierra Club v. Lujan,* 931 F. 2d 1421 (10th Cir. 1991). The Tenth Circuit held that the definition of "person" in 33 U.S.C. 1365(a) subjects federal agencies to penalties pursuant to Section 309(d). *Id.* at 1427. In fact, with respect to the United States, the more specific definition of "person" in 33 U.S.C. 1365(a) takes precedence over the general definition in 33 U.S.C. 1362(5) omitting the United States. *Id.*

Congress is not obligated to place all of its definitions in the same statutory section. Congress instead saw fit to define the United States as a person in the same section that makes the United States liable for civil penalties. This definition applies to the entire act, including 33 U.S.C. 1319.[6]

DOE argues that 33 U.S.C. 1365(a) authorizes only "appropriate" civil penalties under 33 U.S.C. 1319(d), and that penalties against DOE are not appropriate because DOE is not a person. DOE Br. 32. However, "appropriate" in 33 U.S.C. 1365(a) refers to *civil penalties,* not appropriate *persons.* Had Congress wished to shield federal agencies from penalties, it would have allowed the courts to penalize only the appropriate "persons".

Congress' use of "appropriate" civil penalties refers to the well documented judicial discretion to adjust the size of a civil penalty depending on the facts and equities. U.S. EPA's regulations for state water pollution programs require the

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[5] *(footnote 5 cont.)*
of settlement still subjects DOE to penalties pursuant the citizen suit provision. J.A. 90-91. In this event, the court of appeals' finding of mootness for the citizen suit penalty issue would be erroneous and the Court's review appropriate.

[6] When writing other sections of the statute, Congress assumed that federal agencies were persons as defined by the Act. On ten occasions, Congress used the phrase "Federal and State agencies and *other* interested persons." (emphasis added). 33 U.S.C. 1345(d); 33 U.S.C. 1314(a)(1), (a)(2), (b), (c), (d)(1), (d)(2), (d)(3), (e) and (f).

State to seek penalties in amounts "appropriate to the violation." 40 C.F.R. 123.27(c) & note. The equitable factors considered by the courts include, *inter alia*, the seriousness of the violation and good faith efforts to comply.[7] Congress ratified the courts' use of these equitable factors by later incorporating them into Section 309(d) of the Clean Water Act. *Tull v. United States*, 481 U.S. 412, 422, n.8 (1987); 33 U.S.C. 1319(d). A number of decisions have referred to the term "appropriate" in 33 U.S.C. 1365 as confirmation of judicial authority to decide the size of a penalty. *Sierra Club v. Lujan*, 728 F. Supp. 1513, 1518 (D. Colo. 1990), aff'd 931 F. 2d 1421 (10th Cir. 1991); *Student Public Interest Research v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985).

The plain words of the citizen suit provision provide a clear waiver of sovereign immunity. Rather than accepting DOE's inventive construction of 33 U.S.C. 1365, the Court should honor the waiver written by Congress.

V. The Court of Appeals Correctly Held That The Language And Legislative History Of The RCRA Citizen Suit Provision Express Congressional Intent To Penalize Federal Agencies For Illegal Hazardous Waste Conduct.

As with the citizen suit provision of the Clean Water Act, 42 U.S.C. 6972 authorizes suit "against any person (including . . . the United States)" and gives the courts authority "to apply any appropriate civil penalties under section 3008(a)

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[7] DOE makes a remark in passing about penalties when a federal agency "cannot" comply with the law. DOE Br. 22. However, inability to comply is considered as a mitigating factor in penalty assessment under both state and federal law. In addition, the President can exempt a federal facility on such a circumstance under 33 U.S.C. 1323 (and 42 U.S.C. 6961) when in the paramount interest of the United States. Furthermore, to the extent this remark is meant to suggest that federal agencies have been unable, rather than unwilling, to obey the law, the Congressional findings described in the legislative history of RCRA and the Clean Water Act prove otherwise. Arg. I, *supra*.

and (g)." The "appropriate civil penalties" language was added in 1984.

The Senate report accompanying S. 757, the bill providing the current citizen suit provisions, confirms Congressional intent to subject federal agencies to civil penalties. In explaining what would happen to a federal agency which violated the hazardous waste inventory provisions of RCRA, the Senate stated:

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit *and penalty provisions of section 7002.* [42 U.S.C. 6972]. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States . . . ".

S. Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). (emphasis added).

This legislative explanation shows that, when Congress expanded the citizen suit provision to provide civil penalties, it was well aware that the definition of "person" in that provision included the United States. Defining the United States as a "person" in the same section containing the civil penalty authorization was meant to "assure that there is no confusion" about the courts' ability to penalize the United States. That this was the intent of the entire Congress became evident when the conference committee adopted the Senate's version of 42 U.S.C. 6972(a) word-for-word, saying, "The conference substitute adopts the Senate amendment . . . ." Conf. Rep. No. 1133, 98th Cong., 2d Sess. 117 (1984), *reprinted in* 1984 U.S. Code Cong., & Ad. News. 5688-89.

In response to the expression of waiver in 42 U.S.C. 6972 and Senate Report No. 284, DOE again raises its "person" and "appropriate" arguments. The State has responded to

these arguments in the context of the Clean Water Act, and will not repeat these responses here.

The State will, however, respond to one DOE argument unique to this statutory section. According to DOE, the Senate committee report's discussion of civil penalties does not indicate a Congressional intent to waive immunity because the discussion "was buried" in a section of the report unrelated to the citizen suit section. DOE Br. 44.

However, the Senate's discussion of civil penalties against federal agencies appears in a section of the Senate committee report prominently labelled "FEDERAL FACILITIES" in capital letters. S. Rep. No. 284 at 45. This section describes a number of provisions related to federal facilities, including the waiver of sovereign immunity in Section 6001. *Id.* Therefore, it is not surprising to find the penalty discussion of section 7002(a) under the same heading. Certainly, the statement that "a noncomplying agency . . . [is] subject to the citizen suit and penalty provisions of section 7002" is not ambiguous just because Congress simultaneously identified a violation for which an agency can be penalized. If anything, the example illustrates and strengthens Congressional intent.

The explicit language of 42 U.S.C. 6972 and the Senate committee report, either separately or in combination, leaves no doubt about Congressional intent to penalize federal agencies. Added to this language is Congress' intent, expressed in legislative history, to treat federal facilities just like private citizens in order to preserve the effectiveness of the comprehensive hazardous waste program. S. Rep. No. 988 at 23-24. Rather than accepting DOE's invitation to add ambiguity to the statute, the Court should reject DOE's attempt to escape liability for its wrongdoings.

VI. By Interpreting The RCRA Waiver For State Hazardous Waste Penalties In A Manner Inconsistent With The Plain Meaning Of The Language And By Creating An Exception To Exempt Penalties From The Broad Waiver

Intended By Congress To Cover All Enforcement Mechanisms, The Court Of Appeals Violated This Court's Principles Of Statutory Construction And Thwarted Congressional Policy.

A. By Admitting That Congress Used The Words "All Procedural Requirements" To Waive Immunity For Enforcement Mechanisms, And Then Ruling That Procedural Requirements Do Not Include Enforcement Mechanisms, The Court of Appeals Violated The Rules Of Statutory Construction Provided By This Court And Adopted A Rule Of Law Contrary To This Court's Decision In *Hancock v. Train*.

In its consideration of state hazardous waste penalties, the court of appeals acknowledged the history preceding the enactment of the RCRA waiver, concluding:

> Circumstances surrounding the passage of the Resource Conservation and Recovery Act also support a finding that "requirements" include civil penalties.

DOE Pet. App. 10a. The court of appeals even admitted that Congress had used the exact wording *Hancock* stated would effectuate a clear waiver for all enforcement mechanisms. *Id.*, at 10a-11a.

Then the court of appeals inexplicably adopted the Ninth Circuit position that *requirements do not include enforcement mechanisms*, stating that this is "a different plausible" reading of the waiver. DOE Pet. App. 12a. This "plausible" reading contradicts *Hancock*, which describes "enforcement mechanisms" as "procedural requirements" and ratifies the use of "all . . . requirements" as a complete waiver.

Therefore, the court of appeals ascertained underlying Congressional intent and policy in accordance with this Court's decisions in *Philbrook*, *Richards*, and *National City Bank*. However, the court of appeals then searched for "a different plausible" meaning that contradicted that known Congressional intent, thereby adopting the narrowest possible construction of the waiver contrary to this Court's decisions in *Bowen* and *Canadian Aviator*. Because the court of appeals has disregarded this Court's rules of statutory construction, and because that court's opinion will increase the danger and cost of hazardous waste pollution at federal facilities, the Court should reverse the court of appeals on this point.

B. Because The RCRA Waiver Includes All "Requirements" Without Limitation, And Because The Common Meaning Of "Requirements" Includes Civil Penalties, The Court Of Appeals Erred In Deleting Penalties From The Waiver.

The RCRA waiver in 42 U.S.C. 6961 waives immunity from *all* requirements, as follows:

> Each department . . . shall be subject to, and comply with, *all* federal [and] state . . . . requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) . . . .

(Emphasis added). In common usage, "requirements" is defined as "something called for or demanded." *Webster's Third New International Dictionary* 1929 (3d ed. 1981). Hazardous waste civil penalties, being called for or demanded by the hazardous waste laws, are obviously "requirements" of those laws.

To make the waiver even more explicit, the language in parentheses gives some examples of procedural

requirements. Permits, reports, injunctive relief, and sanctions to enforce injunctive relief are all listed as examples of requirements.

These examples are not a complete list of requirements for which sovereign immunity is waived. The section unequivocally states that federal facilities are subject to "*all* . . . requirements" (emphasis added), *including* those listed within the parentheses. The word "including" is a term of enlargement meant to illustrate rather than a limitation meant to exclude all items not specifically listed. *P.C. Pfeiffer Company v. Ford*, 444 U.S. 69, 77 n. 7 (1979); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941).

The nature of the listed examples also demonstrates that "requirements" include enforcement mechanisms. Because "injunctive relief" and "sanctions to enforce such relief" are enforcement mechanisms, "requirements" obviously include enforcement mechanisms. Any other interpretation of the section would be illogical, by saying, on the one hand, that two enforcement mechanisms are requirements and on the other hand, that requirements exclude enforcement mechanisms.

DOE's characterization of "requirements" as "prospective" but not "retrospective" relief (DOE Br. 12-13) creates the same internal inconsistency in the statute. One of the requirements listed in parentheses, reporting, is performed only after the occurrence of an event and thus is "retrospective." Therefore, Congress could not have intended to restrict waivers to prospective relief.

Statutes must be construed in a manner which will avoid inconsistency. *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942). Inconsistency can be avoided only by giving "requirements" the full effect intended by Congress. A normal reading of this provision subjects federal facilities to all enforcement mechanisms, including civil penalties.

Although DOE has argued that the 1976 waiver was meant to be a limited response to *Hancock* and *California*, the

parenthetical list of procedural requirements was not limited to "permits." Listing three requirements not litigated in those cases shows a broader intent to waive and is consistent with Congress' use of "all."

The progression of bills preceding final passage of RCRA also demonstrates the broad scope of its waiver. The enacted waiver originated in S. 3622, which broadly authorized "all . . . requirements, both substantive and procedural." S. Rep. No. 988 at 63.

Because Congress had not yet amended the Clean Water Act and Clean Air Act in response to *Hancock* and *California*, the inclusion of "all" and "procedural" in S. 3622 made the proposed RCRA language different than the waivers in the two existing acts. Nevertheless, Senate Report No. 988 characterized the federal facility section of S. 3622 as "parallel" to the waivers in the existing acts. S. Rep. No. 988 at 24. Congress regarded the existing air and water waivers as comprehensive, and viewed *Hancock* and *California* as misinterpretations of those waivers. See. Arg. I.C. above, especially the quotations from H.R. Rep. No. 294 at 199 and S. Rep. No. 370 at 67. The Senate report discussion in S. 3622 shows that the Senate viewed its RCRA waiver section as parallel to the air and water waivers originally intended by Congress, not as interpreted by *Hancock* and *California*. Therefore, the Senate added "all" and "procedural" to its RCRA bill to effectuate the same complete waiver originally intended in the air and water statutes.

Meanwhile, the House was designing H.R. 14496 without any waiver of immunity. The House decided to assign U.S. EPA the burden of enforcement against federal facilities "rather than subjecting federal facilities to state and local requirements," in order to relieve the states of "the almost impossible burdens of enforcing federal environmental laws against federal polluters." H.R. Rep. No. 1491 at 48-49, 51, *reprinted in* 1976 U.S. Code Cong & Ad. News at 6287, 6289. As a result, only federal hazardous waste requirements applied to federal agencies under the House bill, including civil penalties sought by U.S. EPA.

When passing RCRA, Congress accepted the Senate bill with its broad waiver and rejected the narrow, EPA-enforced federal facilities provision of the House bill. Therefore, rather than preserving federal immunity pursuant to H.R. 14496 and allowing only U.S. EPA to assess penalties, Congress broadly waived immunity for "all" requirements, both federal and state, substantive and "procedural." Substitution of the broad waiver of S. 3622 for the narrow federal facilities section of H.R. 14496 caused federal agencies to "be subject to state law and regulation." 122 Cong. Rec. 32599 (Sept. 27, 1976) (Rep. Skubitz, the minority floor manager). This saddled the States with the "almost impossible burdens" of enforcing the federally mandated hazardous waste programs against federal agencies, but provided States with the enforcement mechanisms to accomplish the task.

DOE contends that a specific reference to civil penalties would appear in the legislative history had Congress intended to authorize them. DOE Br. 39. However, this Court has noted that "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). Congress' reference to *all procedural* requirements makes the RCRA waiver intent clear on its face with respect to penalties.

As enacted, 42 U.S.C. 6961 broadly waived immunity for all requirements "in the same manner, and to the same extent" as private persons. This quoted language is almost identical to the language construed by this Court in *Goodyear Atomic Corp.* to provide a broad waiver without exceptions. 486 U.S. at 185. Obviously, Congress did not intend to place limitations on the RCRA waiver either.

C. By Admitting That The Plain Meaning Of "Requirements" Includes Civil Penalties, And Then Manufacturing Ambiguity As An Excuse To Exempt Penalties From That Plain Meaning, The Court Of Appeals Violated The Rules Of Statutory Construction Followed By This Court.

The district court in *Maine v. Navy*, 702 F.Supp. 322, 326 (D. Me. 1988), app. pend., No. 91-1064 (1st Cir.), remarked that "an intelligent person reading the statute would think the message plain" that RCRA requirements include civil penalties. That court noted that it would have been "nonsensical" to require Congress to make a detailed itemization of requirements in federal law and the laws of fifty states. *Id.*, at 327.

Similarly, the court of appeals below acknowledged:

> An ordinary reading of the phrase, "all . . . requirements," indicates that a civil penalty is a "requirement" because a party violating the statute will be required to pay the penalty.

DOE Pet. App. 10a. Thus, even the court of appeals realized that the plain meaning of the words of RCRA encompasses civil penalties.

Despite the admonitions of this Court to utilize the ordinary meaning of the words in a waiver, *Kosak*, 465 U.S. at 853, the court of appeals abandoned the ordinary meaning of "requirements" in favor of a search for ambiguity. The first reason cited for ignoring the plain meaning of the term concerned some differences in the language of RCRA and Clean Water Act waivers. DOE Pet. App. 11a. However, the courts are not allowed to insert ambiguity into the otherwise clear language of RCRA by looking to another statute. As the Court stated in *Yellow Cab Co.*, 740 U.S. at 550, the courts may not whittle down a broadly worded waiver by resorting to "refinements."

By deviating from the plain meaning of "requirements," the court of appeals also violated the admonition in *Turkette*. As discussed above, *Turkette* warns the courts to effectuate the plain meaning of words of waiver unless there is a *clear* Congressional mandate to differentiate from that plain meaning. 452 U.S. at 580. The court of appeals found no such clear mandate but disregarded the plain meaning of "requirements" anyway.

The second reason given by the court of appeals for its interpretation is the absence of a "specific mention" of "monetary relief or civil penalties." DOE Pet. App. 11a-12a. This reason for declining to find a waiver in 42 U.S.C. 6961 runs afoul of two principles elucidated in decisions of the Court. First, Congress is not required to itemize each and every item of waiver but instead may enact broad, sweeping waivers. *Yellow Cab*, 340 U.S. at 548. Second, strict construction may not be used to create exceptions to a sweeping waiver unless Congress has expressly set forth the exceptions in the statute. *Id.; Kosak*, 465 U.S. at 853. Under these cases, the court below was not permitted to speculate that the absence of the term "civil penalties" could mean an exception for penalties, since Congress has created a waiver for "all . . . requirements."

The court of appeals thus went out of its way to find a meaning for the waiver other than the one intended by Congress. By struggling to find an ambiguity in the waiver, the court of appeals has violated this Court's rules of statutory construction and has thwarted Congressional intent.

The waiver in 42 U.S.C. 6961 broadly requires federal agencies to be treated "in the same manner, and to the same extent" as the private sector. The court of appeals' decision nullifies this waiver and contradicts this Court's broad construction of almost identical language in *Goodyear Atomic Corp.* In order to halt this preferential treatment of polluting federal agencies, the State respectfully requests that the Court reverse the court of appeals decision on this issue.

D. The Post-Enactment Legislative Events Cited By DOE Confirm Congress' Original Intent To Waive Immunity For State Hazardous Waste Penalties.

The Court has used, or declined to use, post-enactment legislative history in its deliberations depending on the circumstances and reliability of the information. Compare

Tennessee Valley Authority v. Hill, 437 U.S. 153, 209 (1978), with *Russello v. United States*, 464 U.S. 16, 26 (1983).

As DOE notes, the conference committee report for the 1986 amendments to CERCLA states that "CERCLA, together with RCRA, requires Federal facilities to comply with all requirements, procedural and substantive, including fees and penalties." DOE Br. 40, n. 35; Conf. Rep. No. 962, 99th Cong., 2d Sess. 242 (1986). A similar statement by a co-sponsor of the CERCLA legislation went unchallenged during the floor debates. 132 Cong. Rec. 28,430 (Oct. 3, 1986). Since Congress designed CERCLA as a second hazardous waste statute to complement RCRA, simultaneous discussion of the two statutes was not unusual and should be afforded some weight.

Although DOE contends that the CERCLA discussion of penalties carries no weight (DOE Br. 40, n. 35), the Department itself chooses to draw on post-enactment history. DOE cites two pending RCRA bills, H.R. 2194 and S. 596, as waivers which are clear due to their express references to civil penalties. DOE Br. 39, n. 34.

However, the House Committee report for H.R. 2194, criticizing the judicial decisions restricting the RCRA waiver, unequivocally declares that the broad 1976 waiver clearly authorized penalties, stating:

> The Committee endorses the Ohio and Maine district court cases as correctly interpreting the intent of Congress in enacting Section 6001. In the Committee's view the language of the existing law was sufficiently clear to waive federal sovereign immunity for all provisions of solid and hazardous waste laws, including the imposition of criminal fines, civil or administrative penalties and all other sanctions. Thus, this legislation reaffirms existing law . . . .

H. Rep. No. 111 at 5. According to the report, H.R. 2194 is necessary only due to the misinterpretation of the waiver

by a number of lower courts.[8] *Id.* The report specifically endorses the district court decision in the case at bar as the correct interpretation of the waiver. *Id.*

House committee reports accompanying earlier versions of H.R. 2194 in past sessions have contained similar language. H.R. Rep. No. 141, 101st Cong., 1st Sess 5 (1989); H.R. Rep. No. 1060, 100th Cong., 2d Sess. 4 (1988). Both reports endorse the district court decision below.

The committee reports describe, in stark terms, the effects of the federal agencies' continued illegal activities as encouraged by the lower courts' failure to enforce Congress' waiver. Congressional investigation discovered that, at DOE facilities, "contamination of soil, sediments, surface water and groundwater, as well as vegetation and wildlife, is extensive . . . ." H.R. Rep. No. 111 at 3. The House report also quoted from the Congressional study, which summarized the results of DOE's unlawful conduct as follows:

> . . . "At every facility the groundwater is contaminated with hazardous chemicals. Most sites in nonarid locations also have surface water contamination. Millions of cubic yards of . . . .

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[8] According to the Senate Committee report accompanying S. 596, the purpose of the bill is to make the waiver "unambiguous." S. Rep. No. 67, 102d Cong., 1st Sess. 1, 7 (1991). This ambiguity was not present in the 1976 waiver, but was engrafted into the statute by the courts' acceptance of inventive federal agency arguments. The Senate committee discussions of ambiguity were made in the context of these court misinterpretations rather than as statements by the committee that the 1976 waiver is ambiguous as written. See S. Rep. No. 67 at 2, 4. The committee's view that the broad 1976 language effectuated a complete waiver is embodied in its statement that the Solid Waste Disposal Act [RCRA] and other pollution laws "all clearly specify that those laws apply to Federal facilities in the same manner and to the same extent as to all other persons." *Id.*, at 2. The committee concluded that addressing these unfavorable court decisions was necessary due to the "magnitude" of federal agency noncompliance with the law, citing a report of "widespread contamination of the environment with toxic chemicals . . . " and "potential human health threats." *Id.* at 3.

> hazardous wastes have been buried throughout the complex, and there are few adequate records of burial site locations and contents."

Id. at 3-4. The study attributed this damage to "poor waste management practices." *Id.*, at 4.

Once Congress amended the waivers in response to *Hancock* and *California*, one would have expected federal agencies to comply with RCRA and the Clean Water Act. However, instead of complying, they have chosen to continue their aggressive litigation against the waivers, expecting to persuade the courts to adopt their strained interpretations of the waiver language. As the Court noted in *Northern Securities*, 193 U.S. at 359-60, one can almost always create doubts about the meaning of a statute. The Court should end the federal agencies' reliance on the judiciary as the buffer between them and the law.

CONCLUSION

The Court should reverse the judgment below with respect to state hazardous waste penalties. In all other respects, the judgment should be affirmed.

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APPENDIX

Pages 29-31 of Brief for Petitioner Environmental Protection Agency in *Environmental Protection Agency v. People of the State of California*, Case No. 74-1435 (Oct. Term, 1975)

within the context of the FWPCA, Section 402(b) not only fails to support the court of appeals' conclusion, but is squarely against it."[57]

Section 505, 33 U.S.C. (Supp. III) 1365, is the only other provision to which the court devoted any significant attention.[58] However, that section affords little, if any, support to the court of appeals' position.

Section 505 is a rather complex multi-functional provision. It is the only jurisdictional provision within the Act for civil suits under the Act; it is the sole waiver of federal immunity [59] from suit for civil

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[57] The court of appeals itself acknowledged the weakness of its own decision in the absence of those supporting bases heretofore discussed:

> Considered in the light of Sections 402 and 510, other sections in the Act afford added support to petitioners' interpretation of the term "requirements" in Section 313, *though the significance of each would have been less certain apart from these two sections.* (Pet. App. 22a-23a; emphasis supplied.)

[58] Section 505(a) establishes jurisdiction in federal courts, limits that jurisdiction to civil actions, eliminates the requirements of a minimal amount in controversy and diversity of citizenship, and defines standing for such an action.

The jurisdiction conferred by Section 505(a) is conditioned specifically upon compliance with the sixty-day notice of suit prerequisite established in Section 505(b).

Under Section 509(b), 33 U.S.C. (Supp. III), 1369(b), certain specific actions of the Administrator can be reviewed exclusively in the appropriate court of appeals on petition. The instant case focuses upon one of the types of action identified in Section 509(b) for such treatment. Another is a challenge to an individual permit. Section 509(b)(1)(F).

[59] That waiver is limited to actions against the federal government or its agencies for violations of an effluent standard or limitation (Section 505(a)(1)) and actions against the E.P.A. Administrator for failure to perform non-discretionary functions under the Act (Section 505(a)(2)).

relief within the Act;[60] and it is the enforcement provision designed to be used by the states to insure compliance with Section 313, inter alia.[61]

Section 505(f) refers, in a parenthetic clause, to Section 313, but this only supports petitioners' position

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[60] From the fact that by California law some substantive limitations may be set following administrative hearings in which a discharger may participate, the court of appeals inferred a federal susceptibility to state administrative procedures under the predecessor to Section 313, and it used that inference as guidance in reaching its decision. (Pet. App. 9a)

The weakness of that approach lies with the fact that there is a marked contrast between participation in hearings and a state permit. The latter is an instrument which may be issued or withheld, thereby giving the states actual control over the operations of the federal government.

As to how a state will establish those standards with which federal facilities must comply, Section 313 is silent; it assures only federal compliance with state standards. It is not a guarantee that the states will not have to modify their administrative practices in order to accommodate the legal characteristics of the federal government, its agencies, and its instrumentalities.

However, federal agencies must cooperate with the states with respect to compliance. Executive Order 11752, Section 3(a)(2), 38 Fed. Reg. 34793, 34794. Hence, they are required to provide states with whatever data are needed for standard setting.

[61] The enforcement mechanism of Section 505(a) is available to the states because a "State" is a "person" (Section 502(5), 33 U.S.C. (Supp. III) 1362(5)), a "person" is a "citizen" (Section 505(g), 33 U.S.C. (Supp. III) 1365(g)), and a citizen can bring suit under Section 505(a).

By providing states with this enforcement procedure through Section 505, Congress has eliminated what would otherwise appear to be a loophole left because the Act does not extend state permitting authority to federal facilites. By Section 313, as well as by Executive Order 11752, *supra*, federal facilities are required to meet applicable substantive standards and limi-

regarding the enforcement function of Section 505. Borrowed directly from Section 304(f) of the Clean Air Act, as amended,[62] the federal facilities compliance reference in Section 505(f) comes at the end of a list

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[61] *(footnote 61 cont.)*
tations. Hence, it would be redundant to impose upon them those same requirements under the authority of a state permit. If a federal installation fails to meet the relevant standards or limitations, it is not a state permit which the state can enforce to secure compliance, but rather the federal law through civil suit.

That Section 505 was intended to be the states' enforcement mechanism for federal facility compliance with Section 313 is made abundantly clear by the legislative history concerning the corresponding provisions in the Clean Air Act, Sections 118 and 304, 42 U.S.C. 1857f and 1857h-2, respectively, as we pointed out in our Brief (at pp. 24-26) in *Kentucky ex rel. Hancock v. Train, supra.*

The Clean Air Act's legislative history is quite relevant to the FWPCA with respect to the "citizen suit" provision, since Section 505 of the FWPCA is modeled upon Section 304 of the Clean Air Act. S. Rep No. 92-414, 92d Cong., 1st Sess. 79 (1971); 2 *Legis. Hist.* 1497.

[62] Section 304(f) of the Clean Air Act, 42 U.S.C. 1857h-2(f), reads as follows:

> (f) For purposes of this section, the term "emission standard or limitation under this Act" means-
>
> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or
>
> (2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act *(including a requirement applicable by reason of section 118)* or under an applicable implementation plan. (emphasis supplied).

A comparison of the Clean Air Act's Section 304(f) with the FWPCA's Section 505(f) (see Appendix, *infra*) undercuts the court of appeals' contention that the Water Act provision is in any way substantially different in form or effect from its Air Act counterpart (Pet. App. 25a).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

STATE OF OHIO, ET AL., CROSS-PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases:	Page
Astoria Federal Sav. & Loan Ass'n v. *Solimino*, 111 S. Ct. 2166 (1991)	7
Bradley v. *United States*, 410 U.S. 605 (1973)	15
Business Guides, Inc. v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. 922 (1991)	11
CPSC v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980)	7
Drain v. *Kosydar*, 374 N.E.2d 1253 (Ohio 1978)	2
Edelman v. *Jordan*, 415 U.S. 651 (1974)	18, 19
Girardier v. *Webster College*, 563 F.2d 1267 (8th Cir. 1977)	9
Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174 (1988)	4, 6
Gully v. *First National Bank*, 299 U.S. 109 (1936)	12
Henry v. *United States*, 251 U.S. 393 (1920)	15
Hoffman v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989)	11
Hutto v. *Finney*, 437 U.S. 678 (1978)	18
Indian Towing Co. v. *United States*, 350 U.S. 61 (1955)	4
International Ass'n of Machinists v. *Central Airlines*, 372 U.S. 682 (1963)	13, 14
Irwin v. *Veterans Admin.*, 111 S. Ct. 453 (1990)	10-11
Jefferson County Pharmaceutical Ass'n v. *Abbott Laboratories*, 460 U.S. 150 (1983)	7
Kordel v. *United States*, 335 U.S. 345 (1948)	3
McDermott Int'l, Inc. v. *Wilander*, 111 S. Ct. 807 (1991)	15
Missouri Pac. R.R. v. *Ault*, 256 U.S. 554 (1921)	4, 5, 6
Ohio Inns, Inc. v. *Nye*, 542 F.2d 673 (6th Cir. 1976), cert. denied, 430 U.S. 946 (1977)	2
Ohio v. *Madeline Marie Nursing Homes*, 694 F.2d 449 (6th Cir. 1982)	2
Papasan v. *Allain*, 478 U.S. 265 (1986)	19
Quern v. *Jordan*, 440 U.S. 332 (1979)	18
Rewis v. *United States*, 401 U.S. 808 (1971)	3
Russello v. *United States*, 464 U.S. 16 (1983)	7
The Abbotsford, 98 U.S. 440 (1878)	15
Toibb v. *Radloff*, 111 S. Ct. 2197 (1991)	11

Cases—Continued: Page

United States v. *Bass*, 404 U.S. 336 (1971) 3
United States v. *Bramblett*, 348 U.S. 503 (1955) 3
United States v. *Braverman*, 373 U.S. 405 (1963) 2-3
United States v. *Clark*, 445 U.S. 23 (1980) 7
United States v. *Cook*, 384 U.S. 257 (1966) 3
United States v. *James*, 478 U.S. 597 (1986) 3
United States v. *Merriam*, 263 U.S. 179 (1923) 15
United States v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) 3
United States v. *N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654 (1947) 6
United States v. *Rojas-Contreras*, 474 U.S. 231 (1985) 11
United States v. *Standard Oil Co.*, 384 U.S. 224 (1966) 2
United States v. *Turkette*, 452 U.S. 576 (1981) 3
United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951) 4

Constitution and statutes:

U.S. Const. Amend. XI 2, 18
Clean Water Act, 33 U.S.C. 1251 *et seq.*:
§ 313(a), 33 U.S.C. 1323(a) 8, 10, 12, 13, 15, 18
§ 402, 33 U.S.C. 1342 13
§ 505(a), 33 U.S.C. 1365(a) 16
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq*:
§ 6001, 42 U.S.C. 6961 18
§ 7002(a), 42 U.S.C. 6972(a) 16
28 U.S.C. 1331 ..... 12, 14, 15
45 U.S.C. 184 (1958) 13
Ohio Rev. Code § 6111.09 ..... 12, 13, 15

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 9, 10
H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. (1977) 11
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977) 11
H.R. Rep. No. 111, 102d Cong., 1st Sess. (1991) 7
S. Rep. No. 284, 98th Cong., 1st Sess. (1983) 17

In the Supreme Court of the United States

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1. The State contends (Resp. Br. 15-20) that, from a policy perspective, there are good reasons to hold governmental facilities liable just like private entities for violations of environmental regulations. We agree that policy arguments can be made for and against the application of sovereign immunity in this context, as in others.[1] But the resolution of

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[1] Indeed, the State routinely asserts its own sovereign immunity as a defense to avoid imposition of penal sanctions,

this case is not advanced by considering the policy arguments underlying assertions of sovereign immunity, here or elsewhere. Those issues have been carefully considered by this Court, and out of that consideration has emerged the long-standing rule that waivers of sovereign immunity must be clear and unambiguous. Respondents do not contest that Congress was acquainted with that rule when it enacted the statutes at issue here. This case therefore turns on whether those statutes waive federal sovereign immunity from civil penalties in a clear and unambiguous fashion, not on whether it would have been a wise policy choice for Congress to have done so.

2. The State argues extensively against application in this case of the well-established rule that waivers of sovereign immunity must be "clear and unambiguous" and will be construed strictly in favor of the government. Resp. Br. 21-22.

Most of the cases cited by the State in support of its argument do not involve claims of sovereign immunity at all, but are instead criminal cases in which this Court rejected arguments by criminal defendants seeking to take advantage of the general principle favoring strict construction of criminal statutes. See, *e.g.*, *United States* v. *Standard Oil Co.*, 384 U.S. 224 (1966); *United States* v. *Braverman*,

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see, *e.g.*, *Drain* v. *Kosydar*, 374 N.E.2d 1253, 1256-1257 (Ohio 1978) (punitive damages not available against the State of Ohio), as well as in other circumstances, see, *e.g.*, *Ohio* v. *Madeline Marie Nursing Homes*, 694 F.2d 449, 457-462 (6th Cir. 1982) (Ohio has not waived Eleventh Amendment sovereign immunity defense in federal court); *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673, 680-681 (6th Cir. 1976) (same), cert. denied, 430 U.S. 946 (1977).

373 U.S. 405, 408 (1963); *United States* v. *Cook*, 384 U.S. 257, 263 (1966); *United States* v. *James*, 478 U.S. 597, 604 (1986); *United States* v. *Turkette*, 452 U.S. 576, 587 n.10 (1981); *United States* v. *Bramblett*, 348 U.S. 503, 510 (1955); *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 550 (1961); *Kordel* v. *United States*, 335 U.S. 345, 349 (1948). But the rule favoring strict construction of criminal statutes has an entirely different provenance from the clear statement rule that applies to waivers of sovereign immunity. In the criminal context, the strict construction principle rests largely on the need to give fair notice to individuals considering undertaking prohibited activity, a rationale that is entirely different from the considerations underlying sovereign immunity doctrine. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971).[2] Accordingly, the above cases provide no support for the State's argument.[3]

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[2] *Bass* also reaffirms the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." 404 U.S. at 349. In this case, the State seeks, *inter alia*, to assess state civil penalties, payable to the state treasury, against the federal government. As discussed in our opening brief (see Br. 17-18), payment of such civil penalties would plainly alter "sensitive federal-state relationships," *Rewis* v. *United States*, 401 U.S. 808, 812 (1971), and should thus trigger a particularly rigorous application of the clear statement rule.

[3] Our opening brief explains (Br. 16-17) why the clear statement rule should be applied with particular care in cases involving penal measures against the federal government. We do not base that argument, however, on the principle that penal statutes generally must be strictly construed. Rather, the argument is based on the long-settled understanding,

The other cases cited by the State fail to support its argument. To be sure, there have been cases in which this Court has found that sovereign immunity had been waived because, in a particular instance, a statute enacted by Congress was found to contain the necessary "clear and unambiguous" waiver. *E.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988); *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955). But the fact that, through application of the clear statement rule, Congress has been found in some cases to have waived sovereign immunity serves merely to reinforce the vitality of the clear statement rule. As we show in our opening brief (Br. 15-18), that rule has been reaffirmed recently and often by this Court.

Moreover, none of the cases cited by the State involved waivers with operative language remotely similar to the statutory language at issue in this case. Nor did any of the cases involve the kind of penal measures at issue here. Thus, as our opening brief explains (Br. 16-17), *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554 (1921), remains the case of this Court most closely analogous to the present one, and the rigorous enforcement of the clear statement rule in *Ault*, where a State sought to impose a civil penalty on a federal instrumentality, should inform the analysis here.

The State asserts (Resp. Br. 25) that *Ault* rested not upon a rigorous application of the clear statement principle, but instead upon the fact that the President, through his agent and acting pursuant to congressionally delegated authority, had issued an

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exemplified by *Ault*, see *infra*, that penalty provisions trigger particularly strong sovereign immunity concerns.

order precluding suit against the government for "fines, penalties and forfeitures." 256 U.S. at 562 n.1 (quoting order). Yet, the Court remarked that the President's agent, in ordering that "fines, penalties and forfeitures" were unavailable, "was careful to confine the order *to the limits set by the act*" (256 U.S. at 564 (emphasis added)), thus indicating that the order in question did not expand the waiver beyond that provided for in the statute. Indeed, the statute gave the President authority only to limit the waiver, not expand it; it provided that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers, * * * except in so far as may be inconsistent * * * with any order of the President." 256 U.S. at 558. Far from resting on any action taken by the President or his agent, the Court's decision was based on its determination that "there is nothing either in the purpose or the letter [of the above quoted statutory language] to indicate that *Congress* intended to authorize suit against the Government for a penalty." *Id.* at 563 (emphasis added).[4] Because "the element of punishment clearly predominates and Congress"—not the President's agent—"has not given its consent that suits of this

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[4] Immediately following the quoted language, the Court added:

> The government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees.

256 U.S. at 563.

character be brought against the United States," the civil penalties sought could not be imposed on the federal instrumentality. 256 U.S. at 565.

3. Nor is the State correct in claiming that we advocate "a new rule of statutory construction" (Resp. Br. 20) that would "force Congress into a straitjacket of specificity when writing waivers of sovereign immunity" (Resp. Br. 24). We fully agree that "immunity waivers must be sensibly construed according to their literal language." Resp. Br. 22. In *Ault*, for example, the Court had no difficulty determining that compensatory remedies—by whatever name they are called—came within the congressional waiver (see 256 U.S. at 564-565), and in *Goodyear Atomic*, the Court found that a statute waiving sovereign immunity as to workers' compensation laws applied to *all* workers compensation laws, regardless of whether they followed the classical model in which workers are automatically entitled to benefits regardless of the employer's fault. 486 U.S. at 183-185.

The clear statement rule, however, cautions against expanding a waiver of sovereign immunity beyond the clear meaning of the language employed by Congress; in doubtful cases, this Court has instructed that the decision to expand the waiver must be made by Congress, not a court. See, *e.g.*, *United States* v. *N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654, 660 (1947). The focus in each case must be on the language employed by Congress in the statute, not on policy considerations that might be thought to justify a particular waiver.

In our opening brief (Br. 39 n.34), we illustrate this point by reference to the current congressional debate over whether to enact a statute clearly waiving sovereign immunity from civil penalties under

RCRA. The State asserts that the reference to current legislation in our brief is in tension with our assertion that post-enactment legislative history carries no weight in analyzing the meaning of earlier legislation. Resp. Br. 48.

We find no such tension. Of course, the current legislative debate is of no relevance in determining the meaning the enacting Congresses attached to the statutes at issue in this case. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 26 (1983); *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983); *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980). Aside from simply informing the Court about related pending legislation, however, our reference to the recent debate is intended to illustrate the way in which the clear statement rule helps assure careful congressional consideration of the wisdom of a particular waiver. See *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991). There is no evidence in the legislative history of either RCRA provision at issue in this case that the Congresses that enacted and amended those provisions gave any thought to the unique problems raised by assessing civil penalties for environmental violations against the federal government. As a result of the clear statement rule, however, Congress is now focusing its attention on legislation that would clearly and unambiguously waive federal sovereign immunity from civil penalties for hazardous waste violations, and its action on that legislation will be informed by consideration of precisely those issues. See H.R. Rep. No. 111, 102d Cong., 1st Sess. 25-29 (1991) (dissenting view), 30-32 (additional views).

4. a. The State advances three arguments in support of its position that the federal facilities provision of the CWA, Section 313(a), 33 U.S.C. 1323(a), waives federal sovereign immunity from civil penalties.

First, the State asserts that the provision employs the term "sanction" which has been defined as including a "penalty." Resp. Br. 27. We have no quarrel with the dictionary definitions of "sanction" quoted by the State. However, as our opening brief explains (Br. 19-21), the provision at issue inextricably couples "sanction" with "process," by waiving sovereign immunity as to "all * * * requirements, administrative authority, *and* process and sanctions." CWA § 313(a), 33 U.S.C. 1323(a) (emphasis added). The provision thus waives sovereign immunity as to "process and sanctions"—*i.e.*, prospective, injunctive relief and sanctions to enforce compliance with such relief. The State offers no explanation for the use of the term "and" to set off the unified expression "process and sanctions" from the two other items on the list and, indeed, under the State's reading, the use of that term would render the provision ungrammatical. In short, although the term "sanctions" may indeed be used to refer generally to penal measures, the grammar of the provision at issue precludes that meaning.

Second, the State asserts (Resp. Br. 28-29) that Congress could have intended the terms "process and sanction" to refer to penal measures (presumably both civil and criminal), in addition to injunctive relief and sanctions to enforce such relief. Although the State cites the current edition of *Black's Law Dictionary* in support of that assertion, that source in fact supports our interpretation of the statute. Black's Law Dictionary generally defines "process" as "any

means used by a court to acquire or exercise its jurisdiction over a person or over specific property" or the "[m]eans whereby a court compels appearance of defendant before it or a compliance with its demands." *Black's Law Dictionary* 1205 (6th ed. 1990).[5] After referring to an older use of the term, the passage states that "[t]he word 'process,' however, as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ." *Ibid.* In accordance with that definition, the term "process and sanction" refers to the means whereby court exercises its jurisdiction and the penalty for those who disregard exercises of that jurisdiction—*i.e.*, in this context, injunctive relief and sanctions necessary to enforce compliance with such relief.

The State's definition of "process" refers to a different part of the dictionary definition, which includes "all the acts of a court from the beginning to the end of its proceedings." Resp. Br. 28. That phrase, however, is a part of the following passage, which purports to define the term "judicial process":

> *Judicial process.* In a wide sense, this term may include all the acts of a court from the beginning to the end of its proceedings in a given cause; but more specifically it means the writ, summons, mandate, or other process which is used to inform the defendant of the institution of proceedings against him and to compel his appearance, in either civil or criminal cases.

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[5] Similarly, the only case cited by the State (Resp. Br. 28), *Girardier* v. *Webster College*, 563 F.2d 1267, 1272 (8th Cir. 1977), cites an older edition of *Black's Law Dictionary* for the proposition that "process" refers to "the means by which a court compels the appearance of a defendant before it or by which the court compels a compliance with its demands."

Black's Law Dictionary at 1205. To begin with, the statute uses the term "process" and the phrase "process and sanction," not the term "judicial process" defined in the above passage. Accordingly, the relevance of the above definition is doubtful. It is all the more doubtful that, in the context of a waiver of sovereign immunity, it is appropriate—or even permissible—to rely on the "wide sense" of a term, rather than its more specific use. CWA § 313(a), 33 U.S.C. 1323(a).

Even if the above definition were of relevance to the issue in this case, it does not support the State's argument. We agree that, in the terms of CWA Section 313(a), federal agencies are "subject to" and must "comply with" the "acts of a court from the beginning to the end of its proceedings" in a CWA case. If the United States does not comply with such acts, it is amenable to "sanctions" that may be imposed by a court to enforce its process. The question in this case, however, is whether it is lawful for a court to impose civil penalties on the United States; that question is not resolved merely by stating, as the State does (Resp. Br. 28), that a court might choose—in our view, improperly—to attempt to use its process to assess a civil penalty for violation of the environmental statutes at issue in this case.

Finally, the State asserts that our interpretation of the statute "contradicts the meaning ascribed by Congress to the same words in the Clean Air Act waiver upon which 33 U.S.C. 1323 is based." Resp. Br. 28. To begin with, the State's assumption that legislative history can establish a waiver of federal sovereign immunity where the terms of the relevant statute do not is mistaken. A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Irwin* v. *Veterans Admin.*,

111 S. Ct. 453, 457 (1990). Resort to legislative history is appropriate only when congressional intent is *not* "unequivocally expressed" in the statute. See, *e.g.*, *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 928 (1991); *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235 (1985). It logically follows that legislative history cannot suffice to establish a waiver of sovereign immunity or to broaden the scope of the waiver specified in the statutory text. Cf. *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 104 (1989).

The legislative history of the CWA does not, in any event, support the State's argument. The only reference to civil penalties cited by the State is a single sentence in a House committee report on an amendment to the Clean Air Act's federal facilities provision, passed a few months prior to the amendment to the CWA federal facilities provision at issue in this case. H.R. Rep. No. 294, 95th Cong., 1st Sess. 200 (1977). Although Congress intended generally "to conform" the CWA provision "with a comparable provision in the Clean Air Act," H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 93 (1977), the language of the Clean Air Act amendment was not adopted intact, as we noted in our opening brief. See Br. 23. In any event, the fact that a committee stated in general terms, without elaboration, that it intended "to conform" the *language* of the CWA provision to that of the Clean Air Act amendment does not lead to the conclusion that the committee, much less Congress, intended to adopt the legislative history of the Clean Air Act provision *in toto* for use in interpreting the corresponding CWA provision.

b. The CWA federal facilities provision contains a proviso that "the United States shall be liable only

for those civil penalties arising under Federal law." CWA § 313(a), 33 U.S.C. 1323(a). As our opening brief explains (Br. 24-30), that proviso uses language ("arising under Federal law") with a well-recognized legal meaning, most familiar from the use of the term "arising under the * * * laws * * * of the United States" in the basic statute granting federal question jurisdiction to the district courts, 28 U.S.C. 1331. We also point out that, under any of the interpretations that have been given to that language, the state civil penalties at issue in this case cannot be said to "aris[e] under Federal law" and, accordingly, cannot be assessed against the United States. See Br. 25-26 (citing cases). In particular, this Court's decision in *Gully* v. *First National Bank*, 299 U.S. 109 (1936), makes clear that the fact that a state statute has received federal approval—even where, as is not the case here, such approval would be necessary to render the state law effective—does not convert it into a statute that arises under federal law.

The State's primary response to this argument is to insist that the dictionary meaning of "arising," not the established legal meaning of the term "arising under," should govern this case because "[t]he Clean Water Act waiver is the product of its own specific purpose and history," while "the interpretations of 28 U.S.C. 1331 are the result of that statute's distinct purpose and history." Resp. Br. 34. The State's argument is unpersuasive.

First, we do not understand how the dictionary definition of the term "arise" as to "originate" or "come into being" (see Resp. Br. 29) supports the State's argument; to the contrary, that definition serves to make our point. The State does not—and cannot—dispute that liability for civil penalties under Ohio Rev. Code § 6111.09 "originated" or "came into be-

ing" when the Ohio state legislature enacted that statute, not when the United States Congress enacted or amended the CWA. Prior to the Ohio legislature's enactment, there was no such liability; when Section 6111.09 was enacted, entities began to be subject to the civil penalties specified in that section. Accordingly, even under the dictionary definition espoused by the State, civil penalties assessed under Ohio Rev. Code § 6111.09 "arise under" state, not federal, law.[6]

Second, whatever may be the dictionary definitions of "arise," the State does not dispute that the phrase "arising under"—the precise phrase used in CWA Section 313(a)—had a well-recognized legal meaning at the time Congress enacted that statute in its present form. As our opening brief explains, under that well-recognized meaning, the civil penalties the State seeks to impose under Ohio Rev. Code § 6111.09 do not "aris[e] under Federal law."

International Ass'n of Machinists v. *Central Airlines*, 372 U.S. 682 (1963), the only case cited by the State, is not to the contrary. *Machinists* involved a provision of the Railway Labor Act requiring creation of "system boards" to address labor disputes in the airline industry. See 45 U.S.C. 184 (1958). Petitioner union and respondent airline had contracted to establish such a board, see 372 U.S. at 683, but

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[6] The State points out that Ohio law borrows federal standards for assessment of civil penalties (Resp. Br. 32) and that EPA approved the Ohio permit program (Resp. Br. 33). Those considerations suggest that the state legislature's *motivation* for enacting the state civil penalties provision may have been to create a state permit program that would supplant the federal program in accordance with CWA Section 402, 33 U.S.C. 1342. They do not show, or even suggest, that Ohio Rev. Code § 6111.09 "arose"—or "originated" or "came into being"—under federal law.

the union brought an action in federal district court alleging that the airline had not complied with an award of the board. This Court held that the case did not "present a serious question of the scope of the arising-under provision of § 1331 or [28 U.S.C. 1337]." 372 U.S. at 696. Rather, the obligation of the airline to comply with the system board's award plainly arose under the federal statute requiring that such boards be created and making their awards "final and binding." See 372 U.S. at 688. Therefore the case came well within the grant of jurisdiction in Section 1331.

This case raises an entirely different issue from *Machinists*. As the State itself notes (Resp. Br. 34), this Court observed that the contract in *Machinists* depended on the federal statute for its "power and authority." 372 U.S. at 692. By contrast, as we explain in our opening brief (Br. 26), the state civil penalties at issue here apply *ex proprio vigore*, entirely independent of federal law. The *Machinists* decision rested on the proposition that parties who enter into a contract concerning performance of an obligation under federal law do not thereby eliminate the federal component of a subsequent dispute concerning the performance of that obligation. This case involves no contract, and the obligation at issue is an obligation to pay civil penalties whose nature and incidence are determined entirely by state law. Because the State is attempting to enforce that obligation entirely under the "power and authority" of state law, *Machinists* does not support the State's argument that the obligation nonetheless arises under federal law.

Finally, the State is mistaken in asserting (Resp. Br. 34-35) that the law surrounding the interpretation of "arising under" in 28 U.S.C. 1331 may be

ignored because the CWA "arising under" proviso and 28 U.S.C. 1331 have distinct purposes. It is well-settled that, where a statute uses a term that has an established legal meaning, it should be presumed that Congress intended that meaning when it enacted the statute. See, *e.g.*, *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807, 811 (1991); *Bradley* v. *United States*, 410 U.S. 605, 609 (1973); *United States* v. *Merriam*, 263 U.S. 179, 187 (1923); *Henry* v. *United States*, 251 U.S. 393, 395 (1920); *The Abbotsford*, 98 U.S. 440, 444 (1878). Moreover, the purposes of Section 1331 and the CWA "arising under Federal law" proviso are not indeed so very different. In both statutes, Congress intended to draw a line to advance a particular federal interest—in the case of Section 1331, ensuring that federal causes of action need not be adjudicated in the courts of a subordinate sovereign and in the case of the CWA provision at issue here, ensuring that the federal government is not subject to civil penalties payable to a subordinate sovereign. In both cases, Congress chose to draw that line on the basis of whether the legal issues had their source in federal or state law.[7]

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[7] The State asserts that the purpose of CWA Section 313(a) was to "encourage compliance with comprehensive, federally approved water pollution programs while shielding federal agencies from unauthorized penalties." Resp. Br. 34-35. We agree with that general statement, but submit that the penalties that Congress found "unauthorized" were penalties such as those arising under state law, in this case Ohio Rev. Code § 6111.09. The State also asserts that Congress's objective "to enforce federal facility compliance with the [CWA]" cannot be "accomplished without the penalty deterrent." Resp. Br. 35. Of course, the issue of how far Congress's objectives may be achieved with or without civil penalties is entrusted to Congress, not the courts. And, in any event, what is at issue with respect to the "arising under" proviso is not *all*

5. With respect to the two citizen suit provisions at issue in this case—CWA § 505(a), 33 U.S.C. 1365(a), and RCRA § 7002(a), 42 U.S.C. 6972(a) —our opening brief points out (Br. 31-34, 40-44) that those provisions authorize district courts to assess only civil penalties that are "appropriate" under the respective civil penalties provisions, which make quite clear that it is never "appropriate" to assess a civil penalty against the United States.

In response, the State asserts that the term "appropriate" was intended to refer "to the well documented judicial discretion to adjust the size of a civil penalty depending on the facts and equities." Resp. Br. 37. We do not disagree with that assertion, as far as it goes. As we have explained (Br. 32-33, 41-42), the term "appropriate" makes clear that the incidents of civil penalties and the determination of when they are to be assessed must be made in accordance with the respective civil penalties provisions. Thus, while the term "appropriate" no doubt was intended to refer to the discretion of a court to determine the size of a civil penalty, there is no reason to believe that it was not also intended to refer to the statutory limits on the circumstances in which such a penalty ought to be assessed, and—most important, for present purposes—the entities against whom it may be assessed. An attempt to assess a civil penalty that is too big, unjustified by the defendant's conduct, or levied against an entity not subject to civil penalties would not be "appropriate" under the civil penalties provisions of the CWA and RCRA. And, because the United States does not come within the class of "persons" against whom those provisions permit the

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civil penalties assessed against the federal government, but only those arising under state law.

assessment of civil penalties, it is never "appropriate" to assess a civil penalty against the United States.

With respect to the RCRA citizen suit provision, the State places substantial reliance (Resp. Br. 40) on a single sentence in a Senate committee report accompanying the 1983 amendements to RCRA, in which the committee asserted that "[e]ither a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of Section 7002." S. Rep. No. 284, 98th Cong., 1st Sess. 45 (1983). Although the State correctly notes (Resp. Br. 40) that the passage was included under the general heading "Federal Facilities," the fact remains that the cited language appears in the second half of a paragraph that, like the balance of that portion of the report, discusses newly enacted provisions requiring the inspection and inventory of federal facilities that handle or generate hazardous wastes. It is not included in the portion of the report discussing the amendment to the civil penalties provision, which contains the statutory language at issue here. Moreover, the committee report is best understood simply to inform Congress that remedies, *if any*, for a failure to comply with the inspection and inventory requirements, are to be found in the citizen suit provision. Indeed, if the language were read—as the State suggests—to indicate Congress's understanding that federal facilities and the Administrator of EPA are subject to civil penalties, it would be plainly mistaken; no provision of RCRA can reasonably be read to authorize civil penalties against the Administrator of EPA.

6. Although the specific statutory language must govern the analysis in this case, we have suggested in our opening brief (Br. 12-13) that a general prin-

ciple emerges from the text of both of the statutes at issue here: that Congress has waived the federal government's immunity from prospective, injunctive relief and sanctions to enforce that relief, but has not waived federal sovereign immunity from retrospective, or penal, forms of relief.[8] In response, the State argues with respect to the RCRA federal facilities provision (Resp. Br. 43) that the distinction between prospective and retrospective relief is in some way inconsistent with the explicit statutory language mandating that the United States comply with reporting requirements. See CWA § 313(a), 33 U.S.C. 1323(a); RCRA § 6001, 42 U.S.C. 6961.

We agree that the United States is subject to reporting requirements, but fail to see the inconsistency suggested by the State. For we have not urged that the statute distinguishes between prospective and retrospective *requirements*, but rather between prospective and retrospective forms of *relief*; reporting requirements mandated by statute or regulatory action are obviously in the former category. Thus, when a court determines that a federal facility has violated water pollution or hazardous waste regulatory measures (such as reporting requirements), it may order the federal government to undertake appropriate remedial actions to bring the federal facility into compliance and it may enforce that order

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[8] The general distinction between prospective and retrospective relief is not unfamiliar in the context of sovereign immunity doctrine. Compare *Edelman* v. *Jordan*, 415 U.S. 651, 664-671 (1974) (retrospective relief not permissible against States under the Eleventh Amendment), with *Quern* v. *Jordan*, 440 U.S. 332, 347-349 (1979) (prospective relief permissible), and *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978) (same).

with sanctions if necessary (prospective relief). It may not, however, simply assess a penalty (retrospective relief) for past failure to comply.

It is true, but immaterial, that permitted prospective relief may, in a given case, impose a greater financial burden on the government than would the prohibited retrospective relief. Nat'l Governors' Ass'n, et al. Amici Br. 20. The fundamental distinction between the two forms of relief nonetheless remains. It is the distinction between ordering that the government comply with legally binding obligations—which may necessitate the expenditure of government funds—and ordering that the government (additionally) disburse funds as a penalty for past noncompliance. See, *e.g.*, *Papasan* v. *Allain*, 478 U.S. 265, 278-282 (1986); *Edelman*, 415 U.S. at 667-668.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

STATE OF OHIO, ET AL., CROSS-PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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22

TABLE OF AUTHORITIES

Cases: Page

Astoria Federal Sav. & Loan Ass'n v. *Solimino*, 111 S. Ct. 2166 (1991) 7
Bradley v. *United States*, 410 U.S. 605 (1973) 15
Business Guides, Inc. v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. 922 (1991) 11
CPSC v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 7
Drain v. *Kosydar*, 374 N.E.2d 1253 (Ohio 1978) 2
Edelman v. *Jordan*, 415 U.S. 651 (1974) 18, 19
Girardier v. *Webster College*, 563 F.2d 1267 (8th Cir. 1977) 9
Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174 (1988) 4, 6
Gully v. *First National Bank*, 299 U.S. 109 (1936) 12
Henry v. *United States*, 251 U.S. 393 (1920) 15
Hoffman v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989) 11
Hutto v. *Finney*, 437 U.S. 678 (1978) 18
Indian Towing Co. v. *United States*, 350 U.S. 61 (1955) 4
International Ass'n of Machinists v. *Central Airlines*, 372 U.S. 682 (1963) 13, 14
Irwin v. *Veterans Admin.*, 111 S. Ct. 453 (1990) 10-11
Jefferson County Pharmaceutical Ass'n v. *Abbott Laboratories*, 460 U.S. 150 (1983) 7
Kordel v. *United States*, 335 U.S. 345 (1948) 3
McDermott Int'l, Inc. v. *Wilander*, 111 S. Ct. 807 (1991) 15
Missouri Pac. R.R. v. *Ault*, 256 U.S. 554 (1921) 4, 5, 6
Ohio Inns, Inc. v. *Nye*, 542 F.2d 673 (6th Cir. 1976), cert. denied, 430 U.S. 946 (1977) 2
Ohio v. *Madeline Marie Nursing Homes*, 694 F.2d 449 (6th Cir. 1982) 2
Papasan v. *Allain*, 478 U.S. 265 (1986) 19
Quern v. *Jordan*, 440 U.S. 332 (1979) 18
Rewis v. *United States*, 401 U.S. 808 (1971) 3
Russello v. *United States*, 464 U.S. 16 (1983) 7
The Abbotsford, 98 U.S. 440 (1878) 15
Toibb v. *Radloff*, 111 S. Ct. 2197 (1991) 11

Cases—Continued: Page

United States v. *Bass*, 404 U.S. 336 (1971) 3
United States v. *Bramblett*, 348 U.S. 503 (1955) 3
United States v. *Braverman*, 373 U.S. 405 (1963) 2-3
United States v. *Clark*, 445 U.S. 23 (1980) 7
United States v. *Cook*, 384 U.S. 257 (1966) 3
United States v. *James*, 478 U.S. 597 (1986) 3
United States v. *Merriam*, 263 U.S. 179 (1923) 15
United States v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) 3
United States v. *N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654 (1947) 6
United States v. *Rojas-Contreras*, 474 U.S. 231 (1985) 11
United States v. *Standard Oil Co.*, 384 U.S. 224 (1966) 2
United States v. *Turkette*, 452 U.S. 576 (1981) 3
United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951) 4

Constitution and statutes:

U.S. Const. Amend. XI 2, 18
Clean Water Act, 33 U.S.C. 1251 *et seq.*:
§ 313(a), 33 U.S.C. 1323(a) 8, 10, 12, 13, 15, 18
§ 402, 33 U.S.C. 1342 13
§ 505(a), 33 U.S.C. 1365(a) 16
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq*:
§ 6001, 42 U.S.C. 6961 18
§ 7002(a), 42 U.S.C. 6972(a) 16
28 U.S.C. 1331 ..... 12, 14, 15
45 U.S.C. 184 (1958) 13
Ohio Rev. Code § 6111.09 ..... 12, 13, 15

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 9, 10
H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. (1977) 11
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977) 11
H.R. Rep. No. 111, 102d Cong., 1st Sess. (1991) 7
S. Rep. No. 284, 98th Cong., 1st Sess. (1983) 17

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1. The State contends (Resp. Br. 15-20) that, from a policy perspective, there are good reasons to hold governmental facilities liable just like private entities for violations of environmental regulations. We agree that policy arguments can be made for and against the application of sovereign immunity in this context, as in others.[1] But the resolution of

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[1] Indeed, the State routinely asserts its own sovereign immunity as a defense to avoid imposition of penal sanctions,

this case is not advanced by considering the policy arguments underlying assertions of sovereign immunity, here or elsewhere. Those issues have been carefully considered by this Court, and out of that consideration has emerged the long-standing rule that waivers of sovereign immunity must be clear and unambiguous. Respondents do not contest that Congress was acquainted with that rule when it enacted the statutes at issue here. This case therefore turns on whether those statutes waive federal sovereign immunity from civil penalties in a clear and unambiguous fashion, not on whether it would have been a wise policy choice for Congress to have done so.

2. The State argues extensively against application in this case of the well-established rule that waivers of sovereign immunity must be "clear and unambiguous" and will be construed strictly in favor of the government. Resp. Br. 21-22.

Most of the cases cited by the State in support of its argument do not involve claims of sovereign immunity at all, but are instead criminal cases in which this Court rejected arguments by criminal defendants seeking to take advantage of the general principle favoring strict construction of criminal statutes. See, *e.g.*, *United States* v. *Standard Oil Co.*, 384 U.S. 224 (1966); *United States* v. *Braverman*,

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see, *e.g.*, *Drain* v. *Kosydar*, 374 N.E.2d 1253, 1256-1257 (Ohio 1978) (punitive damages not available against the State of Ohio), as well as in other circumstances, see, *e.g.*, *Ohio* v. *Madeline Marie Nursing Homes*, 694 F.2d 449, 457-462 (6th Cir. 1982) (Ohio has not waived Eleventh Amendment sovereign immunity defense in federal court); *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673, 680-681 (6th Cir. 1976) (same), cert. denied, 430 U.S. 946 (1977).

373 U.S. 405, 408 (1963); *United States* v. *Cook*, 384 U.S. 257, 263 (1966); *United States* v. *James*, 478 U.S. 597, 604 (1986); *United States* v. *Turkette*, 452 U.S. 576, 587 n.10 (1981); *United States* v. *Bramblett*, 348 U.S. 503, 510 (1955); *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 550 (1961); *Kordel* v. *United States*, 335 U.S. 345, 349 (1948). But the rule favoring strict construction of criminal statutes has an entirely different provenance from the clear statement rule that applies to waivers of sovereign immunity. In the criminal context, the strict construction principle rests largely on the need to give fair notice to individuals considering undertaking prohibited activity, a rationale that is entirely different from the considerations underlying sovereign immunity doctrine. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971).[2] Accordingly, the above cases provide no support for the State's argument.[3]

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[2] *Bass* also reaffirms the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." 404 U.S. at 349. In this case, the State seeks, *inter alia*, to assess state civil penalties, payable to the state treasury, against the federal government. As discussed in our opening brief (see Br. 17-18), payment of such civil penalties would plainly alter "sensitive federal-state relationships," *Rewis* v. *United States*, 401 U.S. 808, 812 (1971), and should thus trigger a particularly rigorous application of the clear statement rule.

[3] Our opening brief explains (Br. 16-17) why the clear statement rule should be applied with particular care in cases involving penal measures against the federal government. We do not base that argument, however, on the principle that penal statutes generally must be strictly construed. Rather, the argument is based on the long-settled understanding,

The other cases cited by the State fail to support its argument. To be sure, there have been cases in which this Court has found that sovereign immunity had been waived because, in a particular instance, a statute enacted by Congress was found to contain the necessary "clear and unambiguous" waiver. *E.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988); *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955). But the fact that, through application of the clear statement rule, Congress has been found in some cases to have waived sovereign immunity serves merely to reinforce the vitality of the clear statement rule. As we show in our opening brief (Br. 15-18), that rule has been reaffirmed recently and often by this Court.

Moreover, none of the cases cited by the State involved waivers with operative language remotely similar to the statutory language at issue in this case. Nor did any of the cases involve the kind of penal measures at issue here. Thus, as our opening brief explains (Br. 16-17), *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554 (1921), remains the case of this Court most closely analogous to the present one, and the rigorous enforcement of the clear statement rule in *Ault*, where a State sought to impose a civil penalty on a federal instrumentality, should inform the analysis here.

The State asserts (Resp. Br. 25) that *Ault* rested not upon a rigorous application of the clear statement principle, but instead upon the fact that the President, through his agent and acting pursuant to congressionally delegated authority, had issued an

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exemplified by *Ault*, see *infra*, that penalty provisions trigger particularly strong sovereign immunity concerns.

order precluding suit against the government for "fines, penalties and forfeitures." 256 U.S. at 562 n.1 (quoting order). Yet, the Court remarked that the President's agent, in ordering that "fines, penalties and forfeitures" were unavailable, "was careful to confine the order *to the limits set by the act*" (256 U.S. at 564 (emphasis added)), thus indicating that the order in question did not expand the waiver beyond that provided for in the statute. Indeed, the statute gave the President authority only to limit the waiver, not expand it; it provided that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers, * * * except in so far as may be inconsistent * * * with any order of the President." 256 U.S. at 558. Far from resting on any action taken by the President or his agent, the Court's decision was based on its determination that "there is nothing either in the purpose or the letter [of the above quoted statutory language] to indicate that *Congress* intended to authorize suit against the Government for a penalty." *Id.* at 563 (emphasis added).[4] Because "the element of punishment clearly predominates and Congress"—not the President's agent—"has not given its consent that suits of this

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[4] Immediately following the quoted language, the Court added:

> The government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees.

256 U.S. at 563.

character be brought against the United States," the civil penalties sought could not be imposed on the federal instrumentality. 256 U.S. at 565.

3. Nor is the State correct in claiming that we advocate "a new rule of statutory construction" (Resp. Br. 20) that would "force Congress into a straitjacket of specificity when writing waivers of sovereign immunity" (Resp. Br. 24). We fully agree that "immunity waivers must be sensibly construed according to their literal language." Resp. Br. 22. In *Ault*, for example, the Court had no difficulty determining that compensatory remedies—by whatever name they are called—came within the congressional waiver (see 256 U.S. at 564-565), and in *Goodyear Atomic*, the Court found that a statute waiving sovereign immunity as to workers' compensation laws applied to *all* workers compensation laws, regardless of whether they followed the classical model in which workers are automatically entitled to benefits regardless of the employer's fault. 486 U.S. at 183-185.

The clear statement rule, however, cautions against expanding a waiver of sovereign immunity beyond the clear meaning of the language employed by Congress; in doubtful cases, this Court has instructed that the decision to expand the waiver must be made by Congress, not a court. See, *e.g.*, *United States* v. *N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654, 660 (1947). The focus in each case must be on the language employed by Congress in the statute, not on policy considerations that might be thought to justify a particular waiver.

In our opening brief (Br. 39 n.34), we illustrate this point by reference to the current congressional debate over whether to enact a statute clearly waiving sovereign immunity from civil penalties under

RCRA. The State asserts that the reference to current legislation in our brief is in tension with our assertion that post-enactment legislative history carries no weight in analyzing the meaning of earlier legislation. Resp. Br. 48.

We find no such tension. Of course, the current legislative debate is of no relevance in determining the meaning the enacting Congresses attached to the statutes at issue in this case. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 26 (1983); *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983); *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980). Aside from simply informing the Court about related pending legislation, however, our reference to the recent debate is intended to illustrate the way in which the clear statement rule helps assure careful congressional consideration of the wisdom of a particular waiver. See *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991). There is no evidence in the legislative history of either RCRA provision at issue in this case that the Congresses that enacted and amended those provisions gave any thought to the unique problems raised by assessing civil penalties for environmental violations against the federal government. As a result of the clear statement rule, however, Congress is now focusing its attention on legislation that would clearly and unambiguously waive federal sovereign immunity from civil penalties for hazardous waste violations, and its action on that legislation will be informed by consideration of precisely those issues. See H.R. Rep. No. 111, 102d Cong., 1st Sess. 25-29 (1991) (dissenting view), 30-32 (additional views).

4. a. The State advances three arguments in support of its position that the federal facilities provision of the CWA, Section 313(a), 33 U.S.C. 1323(a), waives federal sovereign immunity from civil penalties.

First, the State asserts that the provision employs the term "sanction," which has been defined as including a "penalty." Resp. Br. 27. We have no quarrel with the dictionary definitions of "sanction" quoted by the State. However, as our opening brief explains (Br. 19-21), the provision at issue inextricably couples "sanction" with "process," by waiving sovereign immunity as to "all * * * requirements, administrative authority, *and* process and sanctions." CWA § 313(a), 33 U.S.C. 1323(a) (emphasis added). The provision thus waives sovereign immunity as to "process and sanctions"—*i.e.*, prospective, injunctive relief and sanctions to enforce compliance with such relief. The State offers no explanation for the use of the term "and" to set off the unified expression "process and sanctions" from the two other items on the list and, indeed, under the State's reading, the use of that term would render the provision ungrammatical. In short, although the term "sanctions" may indeed be used to refer generally to penal measures, the grammar of the provision at issue precludes that meaning.

Second, the State asserts (Resp. Br. 28-29) that Congress could have intended the terms "process and sanction" to refer to penal measures (presumably both civil and criminal), in addition to injunctive relief and sanctions to enforce such relief. Although the State cites the current edition of *Black's Law Dictionary* in support of that assertion, that source in fact supports our interpretation of the statute. Black's Law Dictionary generally defines "process" as "any

means used by a court to acquire or exercise its jurisdiction over a person or over specific property" or the "[m]eans whereby a court compels appearance of defendant before it or a compliance with its demands." *Black's Law Dictionary* 1205 (6th ed. 1990).[5] After referring to an older use of the term, the passage states that "[t]he word 'process,' however, as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ." *Ibid.* In accordance with that definition, the term "process and sanction" refers to the means whereby court exercises its jurisdiction and the penalty for those who disregard exercises of that jurisdiction—*i.e.*, in this context, injunctive relief and sanctions necessary to enforce compliance with such relief.

The State's definition of "process" refers to a different part of the dictionary definition, which includes "all the acts of a court from the beginning to the end of its proceedings." Resp. Br. 28. That phrase, however, is a part of the following passage, which purports to define the term "judicial process":

> *Judicial process.* In a wide sense, this term may include all the acts of a court from the beginning to the end of its proceedings in a given cause; but more specifically it means the writ, summons, mandate, or other process which is used to inform the defendant of the institution of proceedings against him and to compel his appearance, in either civil or criminal cases.

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[5] Similarly, the only case cited by the State (Resp. Br. 28), *Girardier* v. *Webster College*, 563 F.2d 1267, 1272 (8th Cir. 1977), cites an older edition of *Black's Law Dictionary* for the proposition that "process" refers to "the means by which a court compels the appearance of a defendant before it or by which the court compels a compliance with its demands."

Black's Law Dictionary at 1205. To begin with, the statute uses the term "process" and the phrase "process and sanction," not the term "judicial process" defined in the above passage. Accordingly, the relevance of the above definition is doubtful. It is all the more doubtful that, in the context of a waiver of sovereign immunity, it is appropriate—or even permissible—to rely on the "wide sense" of a term, rather than its more specific use. CWA § 313(a), 33 U.S.C. 1323(a).

Even if the above definition were of relevance to the issue in this case, it does not support the State's argument. We agree that, in the terms of CWA Section 313(a), federal agencies are "subject to" and must "comply with" the "acts of a court from the beginning to the end of its proceedings" in a CWA case. If the United States does not comply with such acts, it is amenable to "sanctions" that may be imposed by a court to enforce its process. The question in this case, however, is whether it is lawful for a court to impose civil penalties on the United States; that question is not resolved merely by stating, as the State does (Resp. Br. 28), that a court might choose—in our view, improperly—to attempt to use its process to assess a civil penalty for violation of the environmental statutes at issue in this case.

Finally, the State asserts that our interpretation of the statute "contradicts the meaning ascribed by Congress to the same words in the Clean Air Act waiver upon which 33 U.S.C. 1323 is based." Resp. Br. 28. To begin with, the State's assumption that legislative history can establish a waiver of federal sovereign immunity where the terms of the relevant statute do not is mistaken. A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Irwin* v. *Veterans Admin.*,

111 S. Ct. 453, 457 (1990). Resort to legislative history is appropriate only when congressional intent is *not* "unequivocally expressed" in the statute. See, *e.g.*, *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 928 (1991); *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235 (1985). It logically follows that legislative history cannot suffice to establish a waiver of sovereign immunity or to broaden the scope of the waiver specified in the statutory text. Cf. *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 104 (1989).

The legislative history of the CWA does not, in any event, support the State's argument. The only reference to civil penalties cited by the State is a single sentence in a House committee report on an amendment to the Clean Air Act's federal facilities provision, passed a few months prior to the amendment to the CWA federal facilities provision at issue in this case. H.R. Rep. No. 294, 95th Cong., 1st Sess. 200 (1977). Although Congress intended generally "to conform" the CWA provision "with a comparable provision in the Clean Air Act," H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 93 (1977), the language of the Clean Air Act amendment was not adopted intact, as we noted in our opening brief. See Br. 23. In any event, the fact that a committee stated in general terms, without elaboration, that it intended "to conform" the *language* of the CWA provision to that of the Clean Air Act amendment does not lead to the conclusion that the committee, much less Congress, intended to adopt the legislative history of the Clean Air Act provision *in toto* for use in interpreting the corresponding CWA provision.

b. The CWA federal facilities provision contains a proviso that "the United States shall be liable only

for those civil penalties arising under Federal law." CWA § 313(a), 33 U.S.C. 1323(a). As our opening brief explains (Br. 24-30), that proviso uses language ("arising under Federal law") with a well-recognized legal meaning, most familiar from the use of the term "arising under the * * * laws * * * of the United States" in the basic statute granting federal question jurisdiction to the district courts, 28 U.S.C. 1331. We also point out that, under any of the interpretations that have been given to that language, the state civil penalties at issue in this case cannot be said to "aris[e] under Federal law" and, accordingly, cannot be assessed against the United States. See Br. 25-26 (citing cases). In particular, this Court's decision in *Gully* v. *First National Bank*, 299 U.S. 109 (1936), makes clear that the fact that a state statute has received federal approval—even where, as is not the case here, such approval would be necessary to render the state law effective—does not convert it into a statute that arises under federal law.

The State's primary response to this argument is to insist that the dictionary meaning of "arising," not the established legal meaning of the term "arising under," should govern this case because "[t]he Clean Water Act waiver is the product of its own specific purpose and history," while "the interpretations of 28 U.S.C. 1331 are the result of that statute's distinct purpose and history." Resp. Br. 34. The State's argument is unpersuasive.

First, we do not understand how the dictionary definition of the term "arise" as to "originate" or "come into being" (see Resp. Br. 29) supports the State's argument; to the contrary, that definition serves to make our point. The State does not—and cannot—dispute that liability for civil penalties under Ohio Rev. Code § 6111.09 "originated" or "came into be-

ing" when the Ohio state legislature enacted that statute, not when the United States Congress enacted or amended the CWA. Prior to the Ohio legislature's enactment, there was no such liability; when Section 6111.09 was enacted, entities began to be subject to the civil penalties specified in that section. Accordingly, even under the dictionary definition espoused by the State, civil penalties assessed under Ohio Rev. Code § 6111.09 "arise under" state, not federal, law.[6]

Second, whatever may be the dictionary definitions of "arise," the State does not dispute that the phrase "arising under"—the precise phrase used in CWA Section 313(a)—had a well-recognized legal meaning at the time Congress enacted that statute in its present form. As our opening brief explains, under that well-recognized meaning, the civil penalties the State seeks to impose under Ohio Rev. Code § 6111.09 do not "aris[e] under Federal law."

International Ass'n of Machinists v. *Central Airlines*, 372 U.S. 682 (1963), the only case cited by the State, is not to the contrary. *Machinists* involved a provision of the Railway Labor Act requiring creation of "system boards" to address labor disputes in the airline industry. See 45 U.S.C. 184 (1958). Petitioner union and respondent airline had contracted to establish such a board, see 372 U.S. at 683, but

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[6] The State points out that Ohio law borrows federal standards for assessment of civil penalties (Resp. Br. 32) and that EPA approved the Ohio permit program (Resp. Br. 33). Those considerations suggest that the state legislature's *motivation* for enacting the state civil penalties provision may have been to create a state permit program that would supplant the federal program in accordance with CWA Section 402, 33 U.S.C. 1342. They do not show, or even suggest, that Ohio Rev. Code § 6111.09 "arose"—or "originated" or "came into being"—under federal law.

the union brought an action in federal district court alleging that the airline had not complied with an award of the board. This Court held that the case did not "present a serious question of the scope of the arising-under provision of § 1331 or [28 U.S.C. 1337]." 372 U.S. at 696. Rather, the obligation of the airline to comply with the system board's award plainly arose under the federal statute requiring that such boards be created and making their awards "final and binding." See 372 U.S. at 688. Therefore the case came well within the grant of jurisdiction in Section 1331.

This case raises an entirely different issue from *Machinists*. As the State itself notes (Resp. Br. 34), this Court observed that the contract in *Machinists* depended on the federal statute for its "power and authority." 372 U.S. at 692. By contrast, as we explain in our opening brief (Br. 26), the state civil penalties at issue here apply *ex proprio vigore*, entirely independent of federal law. The *Machinists* decision rested on the proposition that parties who enter into a contract concerning performance of an obligation under federal law do not thereby eliminate the federal component of a subsequent dispute concerning the performance of that obligation. This case involves no contract, and the obligation at issue is an obligation to pay civil penalties whose nature and incidence are determined entirely by state law. Because the State is attempting to enforce that obligation entirely under the "power and authority" of state law, *Machinists* does not support the State's argument that the obligation nonetheless arises under federal law.

Finally, the State is mistaken in asserting (Resp. Br. 34-35) that the law surrounding the interpretation of "arising under" in 28 U.S.C. 1331 may be

ignored because the CWA "arising under" proviso and 28 U.S.C. 1331 have distinct purposes. It is well-settled that, where a statute uses a term that has an established legal meaning, it should be presumed that Congress intended that meaning when it enacted the statute. See, *e.g.*, *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807, 811 (1991); *Bradley* v. *United States*, 410 U.S. 605, 609 (1973); *United States* v. *Merriam*, 263 U.S. 179, 187 (1923); *Henry* v. *United States*, 251 U.S. 393, 395 (1920); *The Abbotsford*, 98 U.S. 440, 444 (1878). Moreover, the purposes of Section 1331 and the CWA "arising under Federal law" proviso are not indeed so very different. In both statutes, Congress intended to draw a line to advance a particular federal interest—in the case of Section 1331, ensuring that federal causes of action need not be adjudicated in the courts of a subordinate sovereign and in the case of the CWA provision at issue here, ensuring that the federal government is not subject to civil penalties payable to a subordinate sovereign. In both cases, Congress chose to draw that line on the basis of whether the legal issues had their source in federal or state law.[7]

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[7] The State asserts that the purpose of CWA Section 313(a) was to "encourage compliance with comprehensive, federally approved water pollution programs while shielding federal agencies from unauthorized penalties." Resp. Br. 34-35. We agree with that general statement, but submit that the penalties that Congress found "unauthorized" were penalties such as those arising under state law, in this case Ohio Rev. Code § 6111.09. The State also asserts that Congress's objective "to enforce federal facility compliance with the [CWA]" cannot be "accomplished without the penalty deterrent." Resp. Br. 35. Of course, the issue of how far Congress's objectives may be achieved with or without civil penalties is entrusted to Congress, not the courts. And, in any event, what is at issue with respect to the "arising under" proviso is not *all*

5. With respect to the two citizen suit provisions at issue in this case—CWA § 505(a), 33 U.S.C. 1365(a), and RCRA § 7002(a), 42 U.S.C. 6972(a)—our opening brief points out (Br. 31-34, 40-44) that those provisions authorize district courts to assess only civil penalties that are "appropriate" under the respective civil penalties provisions, which make quite clear that it is never "appropriate" to assess a civil penalty against the United States.

In response, the State asserts that the term "appropriate" was intended to refer "to the well documented judicial discretion to adjust the size of a civil penalty depending on the facts and equities." Resp. Br. 37. We do not disagree with that assertion, as far as it goes. As we have explained (Br. 32-33, 41-42), the term "appropriate" makes clear that the incidents of civil penalties and the determination of when they are to be assessed must be made in accordance with the respective civil penalties provisions. Thus, while the term "appropriate" no doubt was intended to refer to the discretion of a court to determine the size of a civil penalty, there is no reason to believe that it was not also intended to refer to the statutory limits on the circumstances in which such a penalty ought to be assessed, and—most important, for present purposes—the entities against whom it may be assessed. An attempt to assess a civil penalty that is too big, unjustified by the defendant's conduct, or levied against an entity not subject to civil penalties would not be "appropriate" under the civil penalties provisions of the CWA and RCRA. And, because the United States does not come within the class of "persons" against whom those provisions permit the

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civil penalties assessed against the federal government, but only those arising under state law.

assessment of civil penalties, it is never "appropriate" to assess a civil penalty against the United States.

With respect to the RCRA citizen suit provision, the State places substantial reliance (Resp. Br. 40) on a single sentence in a Senate committee report accompanying the 1983 amendements to RCRA, in which the committee asserted that "[e]ither a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of Section 7002." S. Rep. No. 284, 98th Cong., 1st Sess. 45 (1983). Although the State correctly notes (Resp. Br. 40) that the passage was included under the general heading "Federal Facilities," the fact remains that the cited language appears in the second half of a paragraph that, like the balance of that portion of the report, discusses newly enacted provisions requiring the inspection and inventory of federal facilities that handle or generate hazardous wastes. It is not included in the portion of the report discussing the amendment to the civil penalties provision, which contains the statutory language at issue here. Moreover, the committee report is best understood simply to inform Congress that remedies, *if any*, for a failure to comply with the inspection and inventory requirements, are to be found in the citizen suit provision. Indeed, if the language were read—as the State suggests—to indicate Congress's understanding that federal facilities and the Administrator of EPA are subject to civil penalties, it would be plainly mistaken; no provision of RCRA can reasonably be read to authorize civil penalties against the Administrator of EPA.

6. Although the specific statutory language must govern the analysis in this case, we have suggested in our opening brief (Br. 12-13) that a general prin-

ciple emerges from the text of both of the statutes at issue here: that Congress has waived the federal government's immunity from prospective, injunctive relief and sanctions to enforce that relief, but has not waived federal sovereign immunity from retrospective, or penal, forms of relief.[8] In response, the State argues with respect to the RCRA federal facilities provision (Resp. Br. 43) that the distinction between prospective and retrospective relief is in some way inconsistent with the explicit statutory language mandating that the United States comply with reporting requirements. See CWA § 313(a), 33 U.S.C. 1323(a); RCRA § 6001, 42 U.S.C. 6961.

We agree that the United States is subject to reporting requirements, but fail to see the inconsistency suggested by the State. For we have not urged that the statute distinguishes between prospective and retrospective *requirements*, but rather between prospective and retrospective forms of *relief*; reporting requirements mandated by statute or regulatory action are obviously in the former category. Thus, when a court determines that a federal facility has violated water pollution or hazardous waste regulatory measures (such as reporting requirements), it may order the federal government to undertake appropriate remedial actions to bring the federal facility into compliance and it may enforce that order

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[8] The general distinction between prospective and retrospective relief is not unfamiliar in the context of sovereign immunity doctrine. Compare *Edelman* v. *Jordan*, 415 U.S. 651, 664-671 (1974) (retrospective relief not permissible against States under the Eleventh Amendment), with *Quern* v. *Jordan*, 440 U.S. 332, 347-349 (1979) (prospective relief permissible), and *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978) (same).

with sanctions if necessary (prospective relief). It may not, however, simply assess a penalty (retrospective relief) for past failure to comply.

It is true, but immaterial, that permitted prospective relief may, in a given case, impose a greater financial burden on the government than would the prohibited retrospective relief. Nat'l Governors' Ass'n, et al. Amici Br. 20. The fundamental distinction between the two forms of relief nonetheless remains. It is the distinction between ordering that the government comply with legally binding obligations—which may necessitate the expenditure of government funds—and ordering that the government (additionally) disburse funds as a penalty for past noncompliance. See, *e.g.*, *Papasan* v. *Allain*, 478 U.S. 265, 278-282 (1986); *Edelman*, 415 U.S. at 667-668.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1991

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Nos. 90-1341 and 90-1517

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OCTOBER TERM, 1991

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v.
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Respondents.

STATE OF OHIO, *et al.*,
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QUESTIONS PRESENTED

1. Whether the express waivers of federal sovereign immunity contained in Section 313 of the Clean Water Act, 33 U.S.C. § 1323, and Section 6001 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6961, for "all requirements" of these laws waive sovereign immunity from civil penalties in CWA and RCRA enforcement actions brought by States.

2. Whether the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365, and the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, which expressly authorize States to bring suits against "any person (including the United States)" and expressly authorize "appropriate civil penalties," constitute waivers of federal sovereign immunity from civil penalties.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	2
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. CWA AND RCRA CLEARLY WAIVE FEDERAL SOVEREIGN IMMUNITY WITH RESPECT TO ALL ENFORCEMENT MECHANISMS, INCLUDING CIVIL PENALTIES	7
A. CWA's Federal Facilities Provision Is A Clear Statement Waiving Sovereign Immunity From Civil Penalties	7
B. CWA's Citizen Suit Provision Contains A Clear Statement Waiving Federal Sovereign Immunity From Civil Penalties	14
C. The RCRA Citizen Suit Provision Unambiguously Waives Federal Facilities' Sovereign Immunity From Civil Penalties	15
D. The RCRA Federal Facilities Provision Unambiguously Waives Federal Sovereign Immunity From Civil Penalties	16
II. THE WAIVERS OF SOVEREIGN IMMUNITY AS TO CIVIL PENALTIES FOR FEDERAL FACILITIES ARE AN ESSENTIAL PART OF THE FEDERALIST REGULATORY SCHEME ESTABLISHED BY CWA AND RCRA	18
CONCLUSION	22

TABLE OF AUTHORITIES

Cases — Page

Canadian Aviator v. United States, 324 U.S. 215 (1945) 13, 21
Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co., 322 U.S. 102 (1944) 15
Crandon v. United States, 110 S. Ct. 997 (1990) 9
D. Ginsburg & Sons v. Popkin, 285 U.S. 204 (1932) 15
EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200 (1976) 12
Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957) 15
Franchise Tax Bd. v. United States Postal Service, 467 U.S. 512 (1984) 21
Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) 4
Hancock v. Train, 426 U.S. 167 (1976) 11-12, 17
Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939) 21
Kosak v. United States, 465 U.S. 848 (1984) 11
Maine v. United States Dep't of Navy, 702 F. Supp. 322 (D. Me. 1988), *appeal pending*, No. 91-1064 (1st Cir.) 9-10
Mountain States Tel. & Tel. v. Santa Ana, 472 U.S. 237 (1985) 9
Norfolk & Western Ry. v. American Train Dispatchers Ass'n, 111 U.S. 1156 (1991) 5, 8, 17-18
P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979) 18
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 4
Sheridan v. United States, 487 U.S. 392 (1988) 11
United States v. Yellow Cab Co., 340 U.S. 543 (1951) 13
Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 4

Statutes and Regulations

40 C.F.R. 123.27 10
2 U.S.C. § 437 19
7 U.S.C. § 1361 19

TABLE OF AUTHORITIES—Continued

	Page
12 U.S.C. § 1457	19
12 U.S.C. § 1847	19
12 U.S.C. § 1884	19
15 U.S.C. § 2069	19
21 U.S.C. § 333	19
28 U.S.C. § 1331	10-11
29 U.S.C. § 216	19
29 U.S.C. § 666	20
33 U.S.C. § 1251	10
33 U.S.C. § 1319	10, 14
33 U.S.C. § 1323	*passim*
33 U.S.C. § 1342	10
33 U.S.C. § 1344	10
33 U.S.C. § 1352	14, 15
33 U.S.C. § 1365	*passim*
41 U.S.C. § 7413	19
42 U.S.C. § 3614	19
42 U.S.C. § 5841	19
42 U.S.C. § 6903	15
42 U.S.C. § 6928	15, 16, 17
42 U.S.C. § 6961	*passim*
42 U.S.C. § 6972	*passim*
42 U.S.C. § 9609	19
42 U.S.C. § 11045	19
49 U.S.C. § 1475	19
49 U.S.C. § 1809	19-20
49 U.S.C. § 2007	19
49 U.S.C. § 11341	8, 17

Miscellaneous

Black's Law Dictionary (Rev. 6th Ed. 1990)	8
Cleanup at Federal Facilities: Hearings Before the Subcommittee on Transportation, Tourism, and Hazardous Materials of the House Committee on Energy and Commerce, 100th Cong., 2d Sess. (1988)	3, 21
Comment, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA*, 57 U. Chi. L. Rev. 845 (1990)	3, 19

TABLE OF AUTHORITIES—Continued

	Page
The Federalist Nos. 45 and 46 (J. Madison)	19
National Governors' Association & National Association of Attorneys General, *From Crisis to Commitment: Environmental Cleanup and Compliance at Federal Facilities* (1990)	2, 3
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977)	20
S. Rep. No. 370, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. Code Cong. & Ad. News 4326	12, 20
S. Rep. No. 284, 98th Cong., 1st Sess. (1983)	16

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. These organizations and their members have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments.

States and the federal government share overall responsibility for enforcing the Clean Water Act and the Resource Conservation and Recovery Act. Because of the lack of meaningful federal enforcement of environmental laws against federally owned facilities, the States have, in effect, sole responsibility for the enforcement of CWA and RCRA at federal facilities such as the Fernald, Ohio uranium processing plant that is the subject of this litigation.

Effective enforcement of the environmental laws at federal facilities is critical to the health and safety of the citizens of every State. Such effective enforcement "depends heavily on two key factors—voluntary compliance by the regulated community", which includes vast numbers of federally owned facilities, "and diligent, independent oversight of environmental activities by state and federal regulators." National Governors' Association & National Association of Attorneys General, *From Crisis to Commitment: Environmental Cleanup and Compliance at Federal Facilities* 10 (1990). "Given the history of noncompliance at many federal facilities," however, "it is clear that effective independent oversight by states is necessary to ensure that environmental laws are being followed." *Id.*

The federal government's persistent but ultimately untenable assertion of sovereign immunity from the civil penalties provisions of CWA and RCRA thwarts effective enforcement of environmental laws at large numbers of federal facilities throughout the country. *Amici* ac-

cordingly submit this brief to assist the Court in the resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Facilities owned by federal agencies such as petitioner DOE have produced some of the nation's worst environmental problems. Because of the federal government's very limited role in enforcement pursuant to its "unitary theory of the executive," [2] the States have primary responsibility for enforcing CWA and RCRA at federal facilities. Congress has expressly waived the federal government's sovereign immunity from a wide range of state enforcement mechanisms available under these statutes. The issue in this case is whether this waiver extends to CWA and RCRA civil penalties.

Resolution of this issue turns on the proper application of well-established rules governing the waiver of sovereign immunity. *Amici* fully agree with DOE as to the fundamental importance of sovereign immunity and generally agree with DOE's articulation (Pet. Br. 16) of the

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

[2] *See Cleanup at Federal Facilities: Hearings Before the Subcommittee on Transportation, Tourism, and Hazardous Materials of the House Committee on Energy and Commerce*, 100th Cong., 2d Sess. 452-54 (1988) (Statement of Acting Assistant Attorney General Marzulla) (institution of judicial and administrative enforcement proceedings by EPA concerning federal facilities disallowed pursuant to theory that "the exercise by any officer at EPA of unilateral authority over another executive branch agency . . . would be unconstitutional and clearly inconsistent with existing Executive Branch dispute resolution mechanisms"); Comment, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA*, 57 U. Chi. L. Rev. 845, 846-47 & n.10 (1990); National Governors' Association & National Association of Attorneys General, *From Crisis to Commitment*, *supra*, at 7 ("[D]ue largely to opposition from the Department of Justice, EPA has been unable to impose a credible enforcement presence at federal facilities.").

principles that govern this question.[3] As *amici* have asserted many times before this Court, the "clear statement" rule protects the proper spheres of government sovereignty—both state and federal. *See Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

Amici disagree, however, with DOE's proposed application of these rules to CWA and RCRA. The "federal facilities" provisions, Section 313 of CWA, 33 U.S.C. § 1323(a), and Section 6001 of RCRA, 42 U.S.C. § 6961, are clear statements of congressional intent to waive the federal government's sovereign immunity from all remedies necessary to enforce those laws—including civil penalties. In addition, the "citizen suit" provisions of both CWA and RCRA waive federal sovereign immunity from civil penalties. 33 U.S.C. § 1365; 42 U.S.C. § 6972.

DOE concedes that Section 313 of CWA and Section 6001 of RCRA are clear statements that waive most federal sovereign immunity defenses. DOE does not dispute, for example, that a State may, under CWA and RCRA, obtain sweeping equitable relief against noncomplying federal fac[illegible] Congress has specifically authorized States to en[illegible]peration of a federal facility, mandate costly improv[illegible]ts to a facility, and impose other far-reaching affirmative obligations on the federal government when necessary to ensure compliance with CWA or RCRA. Nor is there any dispute that Congress has waived federal immunity from contempt sanctions—including monetary penalties—imposed to coerce compliance with injunctive

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[3] It may be, however, that the "clear statement" rule of statutory interpretation should apply with less force when—as in this case—the federal sovereign acts to *waive* its own immunity, than when the federal sovereign acts to *abrogate* state sovereign immunity. In waiver situations, the risk of unwarranted intrusion upon the "historic police powers of the States," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), is not present.

orders.[4] DOE likewise concedes that the citizen suit provisions of CWA and RCRA authorize wide-ranging enforcement actions against federal facilities. *See* Pet. Br. 31, 42-43 (citing 33 U.S.C. § 1365; 42 U.S.C. § 6972(a)).

DOE nonetheless contends that Congress excluded civil penalties from the sweeping waivers of sovereign immunity contained in these statutes. DOE is in error. Section 313 of CWA clearly and unambiguously states that "[e]ach department, agency or instrumentality of the executive, legislative, and judicial branches of the federal government" is "subject" to "*all* Federal, State, interstate and local requirements" respecting water pollution, including all "sanctions." 33 U.S.C. § 1323(a) (emphasis added). The natural meaning of the words "requirements" and "sanctions" encompasses the civil penalties at issue here. By using the word "all," Congress clearly indicated its intention to waive sovereign immunity from every kind of sanction. *See Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1164 (1991).

Furthermore, if no general waiver of sovereign immunity from civil penalties was intended by Section 313 of CWA, then several portions of that provision would be meaningless. Congress would have no reason to exempt federal officials from individual liability for civil penalties if civil penalties were not a permitted remedy in enforcement actions against federal facilities. Similarly, Congress would have had no need to limit the federal government's liability for civil penalties to those civil penalties "arising under federal law."

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[4] *See* Pet. Br. 18 ("the federal facilities provision . . . concededly waives federal sovereign immunity from injunctive relief and sanctions to enforce compliance with such injunctions"); *id.* at 24, 35.

The citizen suit provisions of CWA and RCRA provide an independent source for the waiver of federal sovereign immunity from civil penalties. Section 505 of CWA, 33 U.S.C. § 1365, authorizes "any citizen" to sue "any person, including . . . the United States," to enforce the Act. Section 7002 of RCRA, 42 U.S.C. § 6972, authorizes citizen suits in virtually identical language. Each provision similarly grants federal district courts the authority to impose "any appropriate civil penalties." 33 U.S.C. § 1365; 42 U.S.C. § 6972(a).

Finally, Section 6001 of RCRA contains a broad waiver of sovereign immunity from civil penalties. Like CWA, RCRA expressly waives sovereign immunity from "*all* Federal, State, interstate, and local requirements, both substantive and procedural . . . in the same manner, and to the same extent, as any person is subject to such requirements." 42 U.S.C. § 6961 (emphasis added). Section 6001 explictly includes "sanctions" within the definition of procedural requirements. As in CWA, the word "all" in RCRA makes clear Congress's intention to subject the federal government to the full range of RCRA enforcement mechanisms.

CWA and RCRA are predicated upon our federalist scheme of dual sovereignty. Effective enforcement depends upon the availability to both state and federal authorities of a full range of enforcement mechanisms, including civil penalties, for use against all violators. Yet DOE takes the position that federal facilities are exempted from one critical enforcement mechanism, civil penalties, whereas state and local government facilities are not so exempted. And DOE takes this position even though it would mean that States, indisputably empowered to impose potentially huge demands on the federal fisc through sweeping affirmative injunctive relief (aided

as necessary by contempt sanctions), would be deprived of the civil penalties option, a far less intrusive approach that might be more appropriate to a particular regulatory problem.

DOE thus ignores both the clear and unambiguous language of CWA and RCRA and the dual sovereignty principles that are the basis for enforcement of those statutes. *Amici* accordingly urge the Court to affirm the judgment of the court of appeals insofar as that court found CWA and RCRA to waive federal sovereign immunity from civil penalties.

ARGUMENT

I. CWA AND RCRA CLEARLY WAIVE FEDERAL SOVEREIGN IMMUNITY WITH RESPECT TO ALL ENFORCEMENT MECHANISMS, INCLUDING CIVIL PENALTIES.

A. CWA's Federal Facilities Provision Is A Clear Statement Waiving Sovereign Immunity From Civil Penalties.

Section 313 of CWA contains a sweeping waiver of federal sovereign immunity:

> Each department, agency, or instrumentality . . . of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity. . . .

33 U.S.C. § 1323(a). DOE concedes that this language is a clear statement of congressional intent to waive federal sovereign immunity from an extremely broad range of state enforcement actions, including those seeking extensive equitable relief. *See* Pet. Br. 18, 24, 35. DOE

nonetheless contends that Congress intended to omit civil penalties from the waiver.

Section 313's waiver, however, unambiguously encompasses civil penalties. Parsed to the language that controls this case, Section 313 states: "the Federal government . . . shall be subject to . . . all . . . State . . . requirements . . . and . . . sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." A civil penalty is a sanction, as that term is commonly understood. *See* Black's Law Dictionary 1341 (Rev. 6th Ed. 1990) (sanction is "part of a law which is designed to secure enforcement by imposing a penalty for its violation"). Congress explicitly waived federal sovereign immunity from "all" sanctions. As this Court recently held in *Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, the word "all" in a federal immunity statute "means what it says," absent clear indication to the contrary. 111 S. Ct. at 1164.[5]

DOE seeks to avoid the plain meaning of Section 313 by contending that the term "sanctions" is inseparable from the immediately preceding term "process." Pet. Br. 19-20. As DOE would have it, the sanctions referred to in Section 313 are limited to those imposed to enforce compliance with judicial "process"—contempt sanctions, for example. Congress, however, did not waive immunity for "sanctions to enforce judicial process," as it could have done had it so intended. Rather, Congress explicitly waived immunity for "all . . . process *and* sanctions."

Had Congress intended the meaning DOE now ascribes to Section 313, much of the remainder of that provision would have been wholly unnecessary. First, Section 313

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[5] In *Norfolk & Western*, the Court construed 49 U.S.C. § 11341(a), which grants rail carriers legal immunity for certain transactions. The Court noted that "all" is a word that "indicates no limitation," and that the absence of limitations is "inherent in the word 'all.'" 111 S. Ct. at 1163, 1164.

expressly removes any risk of personal liability for civil penalties against federal officials in suits against federal facilities. 33 U.S.C. § 1323(a). If the preceding language of this provision was not intended to waive sovereign immunity for civil penalties, Congress would have had no need to include this proviso protecting individual federal officials. Second, Section 313 does impose one specific limit on the kinds of civil penalties for which the federal government is liable; the penalties must arise under federal law. *Id.* That provision would also be superfluous if the preceding language in Section 313 had not been intended to waive immunity for civil penalties.[6] *See Mountain States Tel. & Tel. Co. v. Santa Ana*, 472 U.S. 237, 249 (1985) (court should reject construction that would render part of a statute superfluous); *Crandon v. United States*, 110 S. Ct. 997, 1008 (1990) (Scalia, J., concurring) (same).[7]

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[6] Additionally, this proviso subjects the federal government to liability for "civil penalties arising under Federal law *or* imposed by a State or local court to enforce an order or the process of such court." *Id.* (emphasis added). The proviso explicitly distinguishes between "civil penalties arising under federal law" on the one hand, and sanctions imposed to enforce compliance with state and local judicial orders on the other.

[7] As one court has explained, by limiting the federal waiver for civil penalties in this way, Congress has:

> carve[d] out of the generic categories of civil penalties previously imposed those civil penalties which *did not* arise under federal law or which *were not* imposed by a local court order for enforcement purposes. The provision exempts the United States from liability for those civil penalties, and leaves the residue of the generic category of civil penalties (e.g., those that *arise* under federal law, or which *were* imposed by a state or local court) to be borne by the United States. . . . [T]he phrase operates to delimit the broader category of civil penalties for which liability has already, in the mind of the draftsman, been imposed by the clear intendment and all-

The civil penalties at issue here arise under federal law and therefore fall within Section 313's sovereign immunity waiver. The penalties punish violations of the permit system established by CWA. The Act expressly states that the States are "implement[ing] the permit programs *under* sections 1342 and 1344". 33 U.S.C. § 1251(b) (emphasis added). The Ohio regulatory scheme that implements CWA incorporates federal water pollution standards not by chance or by independent choice, but because those are the minimum standards CWA requires for a state implementing program. The civil penalties at issue here were incorporated into Ohio law because the CWA *required*, as a condition of federal approval of the State's regulatory scheme, adequate enforcement authority "including civil and criminal penalties." 33 U.S.C. § 1342(b)(7); 40 C.F.R. 123.27(a)(3). The Ohio enforcement plan now being contested by DOE was specifically approved by EPA pursuant to these statutory and regulatory provisions. Furthermore, EPA can directly enforce the permit requirements as federal requirements. 33 U.S.C. § 1319(a)(1).[8]

DOE bases its construction of the "arising under" language of Section 313 on the construction of analogous language in 28 U.S.C. § 1331. Section 1331, however, has no bearing on the interpretation of CWA because Congress sought wholly different objectives in limiting federal

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inclusive scope of the earlier "all requirements, substantive and procedural" language.

Maine v. United States Dept. of Navy, 702 F. Supp. 322, 329 (D. Me. 1988) (emphasis in the original), *appeal pending*, No. 91-1064 (1st Cir.).

[8] This section states that:

whenever . . . the Administrator [of the EPA] finds that any person is in violation of any condition or limitation which implements [the Clean Water Act] in a permit issued by a State . . . he shall proceed *under his authority* . . . .

33 U.S.C. § 1319(a)(1) (emphasis added).

court jurisdiction under that provision. Section 1331 is intended to ensure that the subject matter jurisdiction of the federal courts remains within the control of Congress. Section 313, by contrast, is intended to ensure that States have adequate enforcement authority to make federal facilities comply with the nation's water pollution laws.[9] As this Court has made plain—and as DOE acknowledges—the term "arising" must be interpreted in light of Congress's specific intent.[10] *Cf. Kosak v. United States*, 465 U.S. 848, 854 (1984) ("arising in respect of" limitation on waiver of sovereign immunity means "associated in any way with"); *Sheridan v. United States*, 487 U.S. 392, 409 (1988) (O'Connor, J., dissenting) ("arising out of" limitation on waiver of sovereign immunity means "associated in any way with").

The history culminating in passage of Section 313 provides confirming evidence of Congress's clear intent to waive sovereign immunity from civil penalties. Section 313 was amended in 1977 in direct response to *Hancock v.*

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[9] The reason for the inclusion of the "arising under" language in CWA is clear. The preceding language in Section 313 waived sovereign immunity for all sanctions imposed by "Federal, state, interstate, or local" authorities. CWA does not have a mechanism for federal approval, and thus federal control, over the level of interstate or local sanctions. Congress wanted to ensure that the federal government would be liable only for those civil penalties included in state-administered enforcement schemes approved by EPA. This provision protects the federal government from exposure to a plethora of local penalties that have not been reviewed and approved pursuant to CWA.

[10] DOE notes that the language "arising under the laws of the United States" in the Constitution has a different meaning than the identical language in Section 1331. DOE argues that cases interpreting the constitutional language have no relevance because "[t]here is no reason to believe that Congress intended to refer to the constitutional meaning of those words when it added the proviso to Section 313(a)." Pet. Br. 35 n. 21. Of course, for the reasons discussed above, there is likewise no basis for believing that Congress intended to refer to Section 1331.

Train, 426 U.S. 167 (1976), and *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976). Those cases addressed whether the Clean Air Act and CWA required federal facilities to comply with State-issued discharge permits. Both statutes required federal facilities to comply with water and air pollution "requirements." The Court perceived a distinction between "substantive requirements," meaning the actual limits that the statutes placed on pollution, and "procedural requirements," which the Court defined as including all "enforcement mechanisms." Because Congress had not made clear that it intended to waive sovereign immunity for *all* requirements, the Court declined to find a waiver of immunity for procedural requirements. *Hancock*, 426 U.S. at 182-186. The Court then invited Congress to "legislate to make [its] intention manifest." *Hancock, id.*; *State Board*, 426 U.S. at 228.

In response, Congress amended Section 313 of CWA in 1977 to specify that federal facilities must comply with "*all*" requirements respecting water pollution "to the same extent as any person is subject to these requirements." In addition, Congress added an even more specific sentence, now the second sentence of Section 313, explaining that "all requirements" includes not only "substantive or procedural" requirements but also "any other requirement whatsoever." 33 U.S.C. § 1323(a); *see also* S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4326. Congress has thus made clear its intention that federal facilities be subject to all procedural requirements. This Court has already ruled that "procedural requirements" include enforcement mechanisms. *See Hancock*, 426 U.S. at 182-86. Under CWA civil penalties are one such mechanism.

DOE's asserted interpretation of Section 313 fails to take account of the inconsistency between that interpretation and the clear, overarching congressional intent to make federal facilities subject to effective state en-

forcement. Congress has explicitly waived sovereign immunity for *all* "requirements" and *all* "sanctions." Those provisions are a clear statement of congressional intent to waive immunity from civil penalties. DOE's contrary position does not rest on the "clear statement" rule, for a clear statement can be sweeping or narrow, general or detailed. Instead, DOE is in effect asking the Court to adopt a new "detailed statement" rule pursuant to which Congress could not waive immunity from "all" requirements and sanctions, but would have to identify precisely each requirement and sanction that has been waived. The clear statement rule is a workable and appropriate rule, and is satisfied when Congress's intent to waive immunity is manifest, as it is here.

In similar contexts, this Court has rejected efforts to truncate broad, clearly stated waivers of federal sovereign immunity. In *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951), for example, the Court rejected an argument very similar to DOE's reading of Section 313. The statute at issue in *Yellow Cab* made the United States liable "in the same manner and to the same extent as a private individual" for "*any claim* . . . on account of personal injury or death . . . caused by" the negligence of a federal employee. 340 U.S. at 548 (emphasis added). This waiver was held to encompass claims for contribution even though the statute did not expressly mention contribution claims, because Congress had made plain its intention to effect a sweeping waiver. The absence of any specific mention of contribution, the Court held, did not create ambiguity as to Congress's intent to waive immunity from "any claim." Identical reasoning governs this case. *See also Canadian Aviator v. United States*, 324 U.S. 215, 222 (1945) (broad waiver cannot "be thwarted by an unduly restrictive interpretation").

B. CWA's Citizen Suit Provision Contains A Clear Statement Waiving Federal Sovereign Immunity From Civil Penalties.

Section 505 of CWA, 33 U.S.C. § 1365, also unambiguously waives federal sovereign immunity from civil penalties. This provision authorizes any "citizen" to sue any "person" for enforcement against violations of the CWA permit system. As DOE concedes, that provision authorizes wide-ranging equitable relief to enforce compliance. Section 505 expressly defines "person[s]" subject to such suits to include the United States, and includes States among the "citizens" who may initiate such actions. Section 505 also clearly states that federal district courts have jurisdiction to impose all appropriate remedies in citizen suits, including "any appropriate civil penalties under section 319(d) of this Act." Congress's intent to impose civil penalties on the federal government could not be more clearly manifested.

DOE seeks to create ambiguity in Section 505 where none exists. DOE argues that Section 505 is ambiguous because it refers to CWA's general civil penalties provision at 33 U.S.C. § 1319(d), which is in turn limited by the general definition of "person" at 33 U.S.C. § 1352(5). Because CWA's general definition of "person" does not expressly include the United States, DOE contends that Congress did not intend to subject the United States to civil penalties under Section 505. *See* Pet. Br. at 32-33.

This argument is meritless. The Section 1352(5) definition of "person" is a general definition applicable only "except as otherwise specifically provided." [11] The citizen

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[11] The general definition states:

> Except as otherwise specifically provided . . .
>
> (5) The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

33 U.S.C. § 1352(5).

suit provision, however, provides a specific definition of "person": a citizen suit may be commenced against "any person (including the United States)." 33 U.S.C. § 1365 (a)(1). "In these circumstances the law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling."'" *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957) (quoting *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) and *D. Ginsburg & Sons v. Popkin*, 285 U.S. 204, 208 (1932)). The specific definition of person in the citizen suit provision is an instance "otherwise specifically provided" for in 33 U.S.C. § 1352 (5), in which that definition includes the United States. Accordingly, for the purpose of civil penalties incorporated into the citizen suit provision, the citizen suit provision's more specific definition of "person" must prevail over the statute's general definition.

C. The RCRA Citizen Suit Provision Unambiguously Waives Federal Facilities' Sovereign Immunity From Civil Penalties.

Section 7002 of RCRA, 42 U.S.C. § 6972, contains a citizen suit provision almost identical to that contained in CWA. Section 7002 subjects the federal government to suits by a person when a federal facility is in violation of RCRA standards and regulations and presents an "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a). States are explicitly included among the "citizens" authorized to bring such actions. 42 U.S.C. § 6903(15). Section 7002 expressly gives district courts the authority in citizen suits to "apply any appropriate civil penalties under [42 U.S.C.] Sections 6928(a) and (g)." *Id.*

In an effort to import ambiguity into this clear provision, DOE argues that immunity from civil penalties is not waived because 42 U.S.C. § 6928 does not specifically mention civil penalties against the federal government. As with the virtually identical language of the CWA citizen suit provision, this strained argument is defeated by a natural reading of the plain language of the statute. *See* discussion *supra* at 14-15.

The legislative history of Section 7002 reinforces the statute's plain meaning. The Senate Report makes clear that

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States."

S. Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). Thus, both the text and the legislative history of Section 7002 make clear that Congress intended to subject the United States to civil penalties under RCRA.

D. The RCRA Federal Facilities Provision Unambiguously Waives Federal Sovereign Immunity From Civil Penalties.

Section 6001 of RCRA, 42 U.S.C. § 6961, provides that:

> Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal government . . . shall be subject to and comply with all Federal, State, interstate and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting the control and abatement of solid waste

> or hazardous waste in the same manner and to the same extent as any person is subject to such requirements.

The core statement in RCRA's federal facilities provision is simple and clear: all federal facilities are subject to "all . . . requirements . . . in the same manner, and to the same extent, as any person." 42 U.S.C. § 6961. Furthermore, "[a]ny person that violates a requirement of this subchapter shall be liable . . . for a civil penalty." 42 U.S.C. § 6928(g). Section 6001 of RCRA thus clearly waives federal sovereign immunity from civil penalties.

By subjecting federal facilities to "all requirements," as it did in the CWA, Congress used the broadest language possible. To avoid any limitation of this language, Congress expressly provided that "requirements" include "both substantive and procedural" requirements, thereby encompassing the entire array of regulations, standards, and "enforcement mechanisms." In short, Congress took to heart this Court's guidance in *Hancock* in selecting the precise language it used to waive sovereign immunity from all enforcement mechanisms. *See* discussion *supra* at 12-13.

DOE nonetheless contends that Section 6001 does not waive sovereign immunity from civil penalties. DOE argues that the "including" clause in Section 6001 was meant to be an exclusive list of the types of requirements for which Congress intended to waive immunity. That argument misreads the "including" language in a manner recently rejected by the Court in *Norfolk & Western Railway Co.* There the Court interpreted the scope of 49 U.S.C. § 11341(a), an immunity provision that waived liability for certain conduct under "all" laws, and followed that waiver of liability with a specific list of laws preceded by the word "including." 111 S. Ct. at 1162. The Court held that the "including" phrase should not be understood as a limitation on the scope of the waiver. *Id.*

at 1163-64. *Cf. P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n.7 (1979) (broadly construing "including").

Indeed, in the present case, the use of the word "sanctions" in the "including" phrase in Section 6001 confirms that Congress intended to encompass sanctions within the word "requirements." There can thus be no doubt that "sanctions" are a subset of the requirements for which federal sovereign immunity is waived. Because civil penalties fall within the common definition of "sanctions," Congress's intention to waive immunity for civil penalties is clear.[12]

II. THE WAIVERS OF SOVEREIGN IMMUNITY AS TO CIVIL PENALTIES FOR FEDERAL FACILITIES ARE AN ESSENTIAL PART OF THE FEDERALIST REGULATORY SCHEME ESTABLISHED BY CWA AND RCRA.

Both CWA and RCRA are premised on innovative enforcement partnerships of the States and the federal government, and draw on the strengths of our federalist system of dual sovereignty. This federalist context—which DOE ignores—is crucial to a proper interpretation of the sovereign immunity provisions in these statutes. Because the States' role is so central to the CWA and RCRA regulatory schemes,[13] civil penalties are so integral to effective enforcement of these laws, and federal facilities are such substantial sources of pollution, Congress could not reasonably have intended to prevent States from using civil penalties when enforcing CWA and RCRA

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[12] Furthermore, because Congress's intent to subject the federal government to civil penalties in RCRA citizen suits, including citizen suits brought by States, is so clear (*see* Point I.C. *supra*), it would be incongruous to conclude that Congress did not intend to subject the federal government to such penalties in direct RCRA enforcement actions brought by the States.

[13] *See* discussion of the federal government's very limited enforcement role at federal facilities, *supra* at 3 & n.2.

against federal facilities. On the contrary, for these very reasons Congress affirmatively intended that States have the important enforcement mechanism of civil penalties available for use against all violators, including federal facilities.

Decentralized enforcement is critical to the effectiveness of these regulatory regimes. Because the sources of pollution are so numerous and dispersed, state authorities are better positioned to determine appropriate enforcement priorities, and will have strong incentives to do so because the primary effects of pollution will be felt locally.[14] For these reasons, CWA and RCRA invest primary responsibility for enforcement in the States.

Civil penalties are an important weapon in the States' enforcement arsenals.[15] Absent the threat of such penal-

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[14] "Much of the nation's environmental legislation relies on state implementation, on the theory that state governments are better situated to address local problems." Comment, *Lawmaker as Lawbreaker*, *supra*, 57 U. Chi. L. Rev. at 867. *See* The Federalist Nos. 45 and 46 (J. Madison) ("By the superintending care of [the States], all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of [the States], the people will be more familiarly and minutely conversant.").

[15] The ubiquitous presence of civil penalty provisions in the U.S. Code attests to the utility of civil penalties as a tool of regulatory policy. *See, e.g.*, the Atomic Energy Act, 42 U.S.C. § 5841; Bank Holding Company Act, 12 U.S.C. § 1847; Bank Protection and Security Act, 12 U.S.C. § 1884; Clean Air Act, 41 U.S.C. § 7413 (d); CERCLA, 42 U.S.C. § 9609(a)-(c); Consumer Product Safety Act, 15 U.S.C. § 2069; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11045; Fair Housing Act, 42 U.S.C. § 3614; Fair Labor Standards Act, 29 U.S.C. § 216; Federal Aviation Act, 49 U.S.C. § 1475; Federal Election Campaign Act, 2 U.S.C. § 437(g); Federal Food Drug and Cosmetic Act, 21 U.S.C. § 333; Federal Home Loan Mortgage Corporation Act, 12 U.S.C. § 1457; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(a); Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 2007; Hazardous Materials Transportation Act, 49 U.S.C. § 1809

ties, a polluter has little reason to comply with regulations unless and until the regulatory authority obtains a judicial order requiring compliance. Given the limited resources generally available to regulatory authorities, the threat of civil penalties is an important means for increasing compliance. Civil penalties also give regulatory authorities an option short of seeking massive structural injunctive relief when a particular violator might be more appropriately brought into line through less harsh measures.

DOE offers no persuasive reason why Congress would have chosen to exempt federal facilities from civil penalties under CWA and RCRA, but waive sovereign immunity for all other enforcement mechanisms—and none exists. When Congress passed these laws, it knew that federally owned facilities were major polluters.[16] Prohibiting States from using civil penalties to combat the serious environmental threat posed by federal facilities would be utterly inconsistent with Congress's objective in waiving sovereign immunity.

Indeed, DOE's interpretation of CWA and RCRA is incongruous. In DOE's view, States would be prohibited from seeking civil penalties against federal facilities, but would be empowered to seek sweeping structural injunctive relief against federal facilities, including massive monetary sanctions to coerce compliance with injunctive orders. Because injunctive relief and contempt sanctions are likely to impose far greater costs on the federal government than would civil penalties, DOE's reading of these statutes cannot be justified as an effort to protect the federal fisc. Furthermore, prohibiting the States from using civil penalties increases the risk of prolonged non-

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(a); Occupational Safety and Health Programs, 29 U.S.C. § 666.

[16] *See, e.g.*, S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4326, 4392 (CWA); H.R. Rep. No. 294, 95th Cong., 1st Sess. 199 (1977) (same).

compliance by federal facilities. Those facilities will have absolutely no incentive to comply with CWA and RCRA until ordered to do so by a court. Disabling States from seeking civil penalties would also force States to resort to more drastic injunctive measures more quickly, when the less drastic remedy of a penalty might be more appropriate to a regulatory problem.

These considerations should inform the Court's analysis of the waivers of sovereign immunity in CWA and RCRA. *Cf. Canadian Aviator*, 324 U.S. at 224-25 (waiver upheld in part because no logical reason for construction urged by government). DOE's reading of CWA and RCRA "'impute[s] to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none.'" *Franchise Tax Bd. v. United States Postal Service*, 467 U.S. 512, 524 (1984) (quoting *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 394 (1939)). As in *Franchise Tax Bd.*, Congress's waiver of sovereign immunity should not be construed to produce anomalous results.

Additionally, if DOE's reading of the sovereign immunity provisions in CWA and RCRA prevails, federal facilities will be immune from civil penalties in enforcement actions brought by States while state and local facilities would remain fully subject to civil penalties in enforcement actions brought by the federal government.[17] Exempting the federal government from civil penalties that remain applicable to state and local governments would be utterly inconsistent with the States' role as equal partners in the innovative regulatory partnership established by CWA and RCRA.

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[17] *See Cleanup at Federal Facilities: Hearings Before the House Subcommittee on Transportation, Tourism, and Hazardous Materials, supra*, at 218-228 (subcommittee report documenting numerous civil penalties against state and local governments obtained under federal environmental laws, including CWA and RCRA).

CONCLUSION

The judgment of the court of appeals should be affirmed with respect to Section 313 of CWA and Section 7002 of RCRA, and should be reversed with respect to Section 6001 of RCRA.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

UNITED STATES DEPARTMENT OF ENERGY,
Petitioner/Respondent,
vs.
STATE OF OHIO et al.,
Respondents/Cross-Petitioners.

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

ARGUMENT SUMMARY 2

ARGUMENT 5

I. WITHOUT THE THREAT OF CIVIL PENALTIES, THE FEDERAL AGENCIES WILL NOT OBEY THE LAW. 5

II. ANALYSIS OF RCRA'S PLAINLY-WORDED WAIVER OF SOVEREIGN IMMUNITY IS NOT AND SHOULD NOT BECOME A SEARCH FOR AMBIGUITY. 10

A. The Waiver of Sovereign Immunity in § 6001 is Plain, Broad, and Unmistakable. 12

B. "Penalties" Are Included in RCRA's Sovereign Immunity Waiver Even Though They Are Not Explicitly Listed in Section 6001. 13

1. There is no requirement that Congress delineate "penalties" by name in order to waive the federal government's immunity to their imposition. 14

2. Congress' use of an exemplary list of "requirements" cannot be interpreted to mean that all items not on the list are implicitly excluded from the universe of "requirements" to which the federal government is subject. 17

III. IN ORDER TO GIVE MAXIMUM SCOPE TO RCRA'S WAIVER OF SOVEREIGN IMMUNITY, CONGRESS APPROPRIATELY RELIED ON THIS COURT'S FOCUS ON THE WORD "ALL" IN *HANCOCK v. TRAIN*. 19

IV. RCRA ALSO SUBJECTS FEDERAL DEPARTMENTS AND AGENCIES TO PENALTIES UNDER ITS CITIZEN SUIT PROVISIONS. 22

V. ABSENT AUTHORITY TO ASSESS CIVIL PENALTIES AGAINST FEDERAL FACILITIES, STATES ARE UNABLE TO FULLY ACHIEVE THE OBJECTIVE OF THE CLEAN WATER ACT. 23

A. Congress has plainly required federal facilities to comply with the Clean Water Act. 23

B. Civil penalties provide needed incentive for federal agencies to comply with the water pollution control laws. 25

C. Congress assigned to the States the primary responsibility to administer and enforce water pollution control programs under the CWA, and, in furtherance of this scheme, Congress authorized States to assess civil penalties against federal facilities. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page**

Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 222 (1945) 11, 12

EPA v. California, 426 U.S. 200 (1976) 6, 26, 27

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 14-17

Hancock v. Train, 426 U.S. 167 (1976) 3, 6, 13, 19-21, 27

Helvering v. Morgan's, Inc., 293 U.S. 121, 125, n.1 (1934) 17

Highway and City Freight Drivers, et al. v. Gordon Transporters, Inc., 576 F.2d 1286 (6th Cir. 1978) 17

Kosak v. United States, 465 U.S. 848 (1948) 12

Legal Environmental Assistance Foundation v. Hodel, 586 F. Supp. 1163 (E. D. Tenn. 1984) 6

Maine v. Navy, 702 F. Supp. 322, 326 (D. Me. 1988), *appeal pending* No. 91-1064 (1st Cir.) 13

Metropolitan Sanitary District of Greater Chicago v. U.S. Department of Navy, 722 F.

Supp 1565, 1569 (N.D. Ill. 1989), *reconsidered in part* 737 F. Supp. 51 (N. D. Ill. 1990) 27

Mitzelfelt v. Dept. of Air Force, 903 F.2d 1293 (10th Cir. 1990) 8

Puerto Rico Maritime Shipping Authority v. I.C.C., 645 F.2d 1102, 1112 n. 26 (D.C. Cir. 1981) 17

Sierra Club v. United States Dep't. of Energy, Civil Action No. 89-B-181 (slip op. at 15-16) (August 13, 1991) 8

United States v. Earth Sciences, Inc., 599 F.2d 368, 376 (10th Cir. 1979) 10

United States v. Mitchell, 463 U.S. 206, 219 (1982) 11

United States v. Washington, 872 F.2d 874 (9th Cir. 1989) 18

United States v. Yellow Cab Co., 340 U.S. 543, 554-555 (1951) 11

Statutes **Page**

33 U.S.C. § 1251(a) 23

33 U.S.C. § 1251(a)(1) 23

33 U.S.C. § 1251(b) 29

33 U.S.C. § 1323 . . . . . 4, 5, 23, 30

33 U.S.C. § 1323(a) 24, 27

33 U.S.C. § 1342(b)(7) 26

33 U.S.C. § 1365 . . . . . 5, 23, 30

33 U.S.C. §§ 1251-1387 (1988) 2

40 U.S.C. § 290 15

42 U.S.C. § 1857 20

42 U.S.C. § 6961 . . . . . 3, 10-12, 14, 16-18, 20, 30

42 U.S.C. § 7418 . . . . . 18, 20

42 U.S.C. §§ 2011-2296 (1982) 6

42 U.S.C. §§ 6901-6992k (1988) 2

Rules **Page**

40 C.F.R. § 123.27(a)(3) (1990) 26

Other Authorities **Page**

50 Fed. Reg. 45736 and 47409 (1985) 6

52 Fed. Reg. 15937 (1987) 7

Black's Law Dictionary, Revised Fourth Ed. at p. 1468 13

EPA Federal Facilities Compliance Manual at I-1 24

Federal Facilities Compliance Act of 1991; Report from the Committee on Energy and Commerce to Accompany H.R. 2194, 102 Cong., 1st Sess. 102-111 (1991), at 3 9

GAO, Report to Congressional Requestors: *Stronger Enforcement Needed to Improve Compliance of Federal Facilities* (1988) at 3 9

H.R. Rep. No. 1491, 94th Cong. 2d. Sess. 83-84, *reprinted in* 1976 U.S. Code Cong. Ad. News 6321 . . . 26

Report of the NGA-NAAG Task Force on Federal Facilities, *From Crisis to Commitment: Environmental Compliance at Federal Facilities* (January, 1990) at 7 9

S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4392 27

S. Rep. No. 414, 92nd Cong., 2d Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3733 . . . . . 24, 25

Nos. 90-1341 and 90-1517

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

UNITED STATES DEPARTMENT OF ENERGY,
Petitioner/Respondent,
vs.

STATE OF OHIO et al.,
Respondents/Cross-Petitioners.

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

The States and Commonwealths of California, Colorado, Alaska, Arkansas, Arizona, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and Washington, file the following Memorandum Brief in support of the position urged by the State of Ohio ("Ohio") in the above-captioned case.

INTEREST OF AMICI CURIAE

Each of the 30 states and commonwealths joining this brief as friends of the court faces problems of enormous magnitude in enforcing state laws and regulations arising

under the Clean Water Act[1] and the Resource Conservation and Recovery Act.[2] These problems are frequently exacerbated by the presence in each state of what may be the nation's largest polluter: the United States Government. In many states, the federal government is a substantial discharger to state waters, and is one of the largest, if not the largest, generator of hazardous waste. To make matters worse, federal agencies have been among the most recalcitrant of polluters. Without the sanction of civil penalties, states will be hamstrung in their ability to compel federal agencies to comply with the law. Thus, each of the amici joining in this brief have an interest in the effective enforcement of their state laws through the penalty process.

ARGUMENT SUMMARY

Federal agencies have strongly resisted the efforts of states and the federal government to enforce environmental laws. The Department of Energy (DOE) in particular has demonstrated a long history of noncompliance. Civil penalties are necessary to assure compliance with environmental laws.

Inherent in the concept of sovereign immunity is the sovereign's ability to waive its immunity. RCRA's waiver of the sovereign's protection against suit is plain, broad, and yields the unmistakable conclusion that penalties against the

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[1]Water Pollution Prevention and Control Act (Clean Water Act or CWA), 33 U.S.C. §§ 1251-1387 (1988).

[2]Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988).

federal government are included within its terms.[3]

In this case, the issue is not whether the federal government has consented to be sued, or whether it has consented to subject important federal programs to potential interference from states through the judicial process. The federal government concedes as much, recognizing that RCRA has broad injunctive powers to which the Congress has waived sovereign immunity. The only question here is whether, in addition to exercising their injunctive powers, states can levy monetary penalties against federal agencies and instrumentalities that violate the law. Accordingly, this Court need only look, as precedent directs, to the ordinary meaning of the words Congress employed. Analysis that searches for hidden ambiguities in the statute is unwarranted. It leads to further litigation and promotes the drafting of ever-more complex and convoluted statutes that defy interpretation.

By subjecting the federal government to "all" RCRA requirements, both substantive and procedural, Congress stated its intention that the federal government is subject to penalties. Short of listing each and every possible variation of "requirements" to which the federal government is subject, it is difficult to construct a clearer waiver. In fact, Congress' choice of language dovetails precisely with this Court's decision in *Hancock v. Train*, 426 U.S. 167 (1976), where the failure to waive immunity for "all" requirements led this Court to conclude that the Clean Water Act could not be enforced against the federal government through the permitting process.

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[3]RCRA § 6001, 42 U.S.C. § 6961. The full text of § 6001 is reproduced at p. 3a of the appendix in the brief of the petitioner, United States Department of Energy.

Amici also urge this Court to affirm the decision of the Court of Appeals as it relates to penalties under the citizen suit provisions of RCRA. As with the general penalty provisions of RCRA, amici do not see penalties as a means to fund their state treasuries; rather, they see citizen suit penalties as a valuable deterrent. Even when the penalty is paid by the United States to the United States, the inconvenience and embarrassment this process imposes on the officials of the penalized agency acts as a deterrent.

The CWA also waives federal sovereign immunity, expressly subjecting federal agencies to all water pollution control laws, whether at the federal, state, interstate or local level. The federal government is not questioning the amici's authority to sue the federal government for noncompliance with the CWA, again conceding such authority by recognizing the states' ability to obtain injunctive relief against federal agencies who violate the CWA. The issue instead is whether states can impose civil penalties against the federal government for violations of the water pollution control laws.

Civil penalties are a critical element to the successful administration of the CWA. The CWA provides for civil penalties and requires states to have the authority to collect civil and criminal penalties to obtain federal approval of their permit programs. By its terms, § 1323 of the CWA subjects the federal government to the imposition of civil penalties. The current language of § 1323 was crafted by Congress in 1977 in response to the federal government's long-standing failure to comply with the water pollution laws. This provision specifically subjects the federal government to **all** water pollution control laws, including civil penalties.

The ability to assess civil penalties against the federal government by necessity must extend to states because the

primary responsibility for administering the water quality programs under the CWA, and the only responsibility for enforcing these programs against the federal government, rests with the states. The objective of the CWA could not be fully realized without the authority of the states to impose civil penalties against the federal government. Accordingly, the amici states urge this Court to affirm the decision of the Court of Appeals regarding the authority of states to impose civil penalties under § 1323 of the CWA, and to recognize the states' authority to seek civil penalties pursuant to § 1365 of the CWA.

ARGUMENT

I.

WITHOUT THE THREAT OF CIVIL PENALTIES, THE FEDERAL AGENCIES WILL NOT OBEY THE LAW.

Although Congress has repeatedly commanded federal agencies to comply with state and federal environmental laws, the federal agencies routinely ignore these commands. Their ability to brazenly violate these laws is bolstered by a Department of Justice policy that prevents the Environmental Protection Agency (EPA) from taking unilateral enforcement action against a sister federal agency. It is further bolstered by judicial decisions holding that the waivers of sovereign immunity contained in RCRA and other federal environmental laws do not extend to the imposition of fines and penalties. With little to fear from EPA, and without the prospect of being penalized for violating environmental statutes, regulations, permits or administrative orders, federal agencies have no incentive to divert attention -- and resources -- from their "primary" missions in order to

comply with environmental requirements. The Department of Energy's history of attempts to avoid RCRA regulation illustrate the problem.

This Court is already familiar with the federal agencies' reluctance to abide by the permitting requirements of state air and water pollution control laws. Thus, when this Court ruled in *Hancock v. Train*, 426 U.S. 167 (1976), and *EPA v. California*, 426 U.S. 200 (1976), that the federal government had not waived its sovereign immunity regarding air and water quality permits, Congress reacted swiftly to amend the waiver of immunity. Congress was also careful to subject federal agencies to RCRA's permitting requirements when it first passed that Act.

The Department of Energy did not immediately take steps to comply with RCRA's permit requirements, however. To the contrary, the Department asserted that the statute did not apply to DOE because such application would be inconsistent with the Atomic Energy Act (AEA), 42 U.S.C. §§ 2011-2296 (1982) (AEA). Notably, EPA did nothing to challenge this interpretation. However, the Department of Energy's position was quickly rejected by the federal district court in *Legal Environmental Assistance Foundation v. Hodel*, 586 F. Supp. 1163 (E. D. Tenn. 1984).

The Department next sought to limit RCRA's application to its activities through rulemaking, by redefining "byproduct material," a term used in the Atomic Energy Act, to encompass mixtures of radioactive and hazardous wastes. 50 Fed. Reg. 45736 and 47409 (1985). Because the AEA reserves regulation of byproduct material at Department of Energy facilities solely to Department of Energy, this redefinition would have precluded RCRA jurisdiction over such materials. When persons commenting on the

Department's proposed definition pointed out that this redefinition was inconsistent with Congressional intent underlying the Atomic Energy Act, the Department of Energy conceded the issue and promulgated a more reasonable definition. 52 Fed. Reg. 15937 (1987).

Following this setback, the Department of Energy next asserted that certain mixtures of hazardous wastes and radioactive materials contained so much radioactive material that they were not "wastes" at all and thus not subject to RCRA, but "residues" that could be recycled. In ruling recently that the Department of Energy had violated RCRA by not obtaining a permit to store such residues at its Rocky Flats, Colorado, plant, the federal district court chastised the Department's recalcitrance:

> DOE has been duty bound for years to obtain its permit. Nevertheless, the record in this case shows a constant pattern of delay and obfuscation....
>
> Only on my questioning of government counsel at the ... hearing did DOE cease its circuitous reasoning and admit its undeniable RCRA violation.
>
> DOE's demonstrated attitude is that it is a governmental agency that can avoid RCRA's mandates indefinitely with impunity....
>
> Perhaps DOE's attitude toward RCRA stems from the lack of teeth in RCRA's enforcement mechanisms vis-a-vis DOE. Sovereign immunity bars state imposed civil and criminal

> penalties in actions against the DOE. [citation omitted]

Sierra Club v. United States Dep't. of Energy, Civil Action No. 89-B-181, slip op. at 15-16, (D. Colo. August 13, 1991). The district court's last statement, of course, was mandated by the Tenth Circuit's decision in *Mitzelfelt v. Dept. of Air Force*, 903 F.2d 1293 (10th Cir. 1990). In ordering DOE to obtain a state RCRA permit for the residues within two years, the court stated:

> DOE's ongoing disregard for RCRA's linchpin permit process has been flagrant. Absent appropriate sanction, I have no credible reason to believe that DOE will comply with a two-year time requirement. Therefore, I conclude that nothing less than the threat of shutdown on noncompliance with this order will effectively enforce the requirement that DOE obtain a RCRA permit....

Sierra Club v. United States Dep't. of Energy, slip op. at 16-17. As the court's opinion makes clear, absent civil penalties, the sanctions available to states to compel federal agencies to comply with the law are few, extreme, and unwieldy in many cases.

The Department of Energy's response to state efforts to enforce RCRA at its facilities reveals a pattern of delay and litigation that seems calculated to defer until the latest possible moment the time when it will actually have to comply with the law's requirements. Sadly, this pattern is not limited to Department of Energy, nor to RCRA, but is pervasive among federal agencies faced with the obligation to comply with environmental requirements. According to

the EPA, the Department of Defense and the Department of Energy's rate of compliance with RCRA is 10 percent to 15 percent lower than that of private industry. *Federal Facilities Compliance Act of 1991; Report from the Committee on Energy and Commerce to Accompany H.R. 2194*, 102d Cong., 1st Sess., Rep. No. 111 (1991) at 3 (hereinafter *Committee on Energy and Commerce Report*). Federal noncompliance with the CWA and state water quality acts is even more egregious. Nationwide, federal facilities' noncompliance rate with CWA environmental standards is twice that of private industry. GAO, Report to Congressional Requestors: *Stronger Enforcement Needed to Improve Compliance of Federal Facilities* (1988) at 3. During 1986 and 1987, twenty percent of 150 major federal facilities were not in compliance with the CWA. *Id.*

Under the "unitary executive" theory, Department of Justice forbids the EPA from going to court against its sister federal agencies. Its ability to require federal agencies to comply with environmental statutes has frequently been reduced to "jawboning" miscreant agencies and their facilities. Report of the National Governor's Association-National Association of Attorneys General Task Force on Federal Facilities, *From Crisis to Commitment: Environmental Compliance at Federal Facilities* (January, 1990) at 7. Thus, under RCRA and the CWA, only the states are able to bring federal agencies to court to enforce Congress' mandate that the federal government comply with all federal, state and local requirements respecting these environmental laws.

Civil penalties are an essential tool in the enforcement arsenal of amici's environmental programs. Indeed, the United States has argued in other enforcement cases, with judicial approval, that environmental regulatory agencies need both the ability to bring actions to prevent future

violations as well as the ability to punish offenders for past violations by assessing civil penalties. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 376 (10th Cir. 1979). Without the ability to seek and enforce penalties, injunctive relief is the only practical remedy available to states where federal facilities violate these laws. Although effective in stopping continuing violations at an individual facility, an injunction has little deterrent value. The facility which is found to have violated the law and suffers an injunction is no worse off than the facility which obeys the law in the first place, since the only penalty imposed upon such polluters is that they cease violating the law and correct past violations. As a result, the threat of an injunction does little to promote self-enforcement and voluntary compliance.

Civil penalties, on the other hand, act as a deterrent and promote self-enforcement and voluntary compliance. When violators are penalized for proven violations in addition to being ordered to correct them, the proven violator is left in a worse position than one who obeys the law. Civil penalties, therefore, provide an effective deterrent for violations not provided by injunctive relief alone. Without the authority to impose civil penalties, the states' ability to assure federal compliance with state laws governing solid and hazardous waste and water quality is significantly undercut.

II.

ANALYSIS OF RCRA'S PLAINLY-WORDED WAIVER OF SOVEREIGN IMMUNITY IS NOT AND SHOULD NOT BECOME A SEARCH FOR AMBIGUITY.

Although lengthy, RCRA § 6001 is plainly worded,

and the words which should control this case are few. When reduced to the elements that are essential to application of state solid waste and hazardous waste penalty provisions, § 6001 states simply that federal departments "shall be subject to and comply with all state ... requirements, both substantive and procedural ... in the same manner, and to the same extent, as any person is subject to such requirements."[4]

Time and again, this Court has stated that a plainly worded waiver of sovereign immunity should not bring with it additional exceptions or further roadblocks to suit. Instead, once authority is plainly given, it is liberally construed. (*See, e.g.*, *United States v. Yellow Cab Co.*, 340 U.S. 543, 554-555 (1951) ["No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy"]; *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945) ["[W]e think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation"]; *United States v. Mitchell*, 463 U.S. 206, 219 (1982) ["'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"]) Once it is ascertained that Congress wrote a broad, unambiguous and comprehensive waiver of sovereign immunity, the conclusion necessarily follows that penalties are part of that waiver.

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[4]The import of additional parts of § 6001, represented by ellipses in the main text herein, is discussed later in this brief.

A. The Waiver of Sovereign Immunity in § 6001 is Plain, Broad, and Unmistakable.

The question before this Court is simply whether penalties are one of the set of "all requirements" to which Congress decreed the federal government is subject. In order to answer this question, an examination of the plain meaning of the statute is essential, since in construing the meaning of a statute, the courts ordinarily assume that legislative intent is expressed by the ordinary meaning of the words used. *Kosak v. United States,* 465 U.S. 848 (1948). This Court, while "strictly construing" waivers of sovereign immunity, has rejected overly restrictive interpretations based simply on the fact that suits against the sovereign are at issue. *(Canadian Aviator, supra.)*

In the case of RCRA § 6001, Congress declared that the United States is subject to **all** requirements, both substantive and procedural, in the same manner, and to the same extent, as any person is subject to such requirements. By its use of the word "all", Congress unmistakably expressed its intent to enact the broadest possible waiver of sovereign immunity, and to deprive agencies and departments of the United States of any exemption not available to others who are subject to solid and hazardous waste control laws. Similarly, by covering the universe of substantive and procedural requirements, Congress sought to avoid needless inquiry concerning artificial distinctions relating to the nature of the "requirements" to which the United States is subject. Nevertheless, even though the Department of Energy concedes that it is subject to "all" requirements (procedural and substantive), it argues that penalties are not a "requirement." Under the precedent discussed above, the linchpin of analysis is whether a plain reading of

"requirements" includes penalties. If, as amici contend, it does, then extended comparison to other statutes and legislative history[5] is unnecessary.

In "requirement," Congress deliberately chose a broad word, whose ordinary meaning encompasses any mandatory provision of law, including civil penalties. "Require" means "to direct, **order, demand**, instruct, command, **claim**, compel, request, need, or exact." Black's Law Dictionary, Revised Fourth Ed. at p. 1468 (emphasis added). "Requirements" mean "something called for or demanded." *Maine v. Navy,* 702 F. Supp. 322, 326 (D. Me. 1988), *appeal pending* No. 91-1064 (1st Cir.) A civil penalty mandated by statute is plainly an order, demand or claim, and is therefore within the common meaning of "requirement."

B. "Penalties" Are Included in RCRA's Sovereign Immunity Waiver Even Though They Are Not Explicitly Listed in Section 6001.

As described above, Congress' broadly-written waiver plainly includes penalties within the sweep of the meaning of "all requirements." Indeed, "it is hard to imagine clearer language short of listing every possible variation of such requirements." *Maine v. Navy, supra,* 702 F. Supp. at 333.

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[5]Amici believe that Congress should be able to rely on the plain meaning of the words it used, especially when those words follow the direction of this court in *Hancock v. Train,* 426 U.S. 167 (1976), discussed later in this brief. Amici do not, however, mean to suggest that the legislative history fails to support the conclusion that Congress intended to subject the federal government to penalties under RCRA. This analysis is ably presented by the State of Ohio and will not be repeated here.

Although Congress is not required to delineate an all-inclusive list of "every possible variation" defining "all requirements," it is this shortcoming -- and Congress' decision instead to list non-exclusive **examples** of requirements[6] -- upon which the Department of Energy seizes to avoid penalties as one of the requirements of state law to which it is subject. (Petitioner's brief, pp. 35 and 36.) Amici urge this Court to reject this overly-restrictive interpretation of RCRA's sovereign immunity waiver. The plaint that "civil penalties" are not specifically listed in the RCRA waiver at first blush seems appealing, since it seems little to ask Congress to add an additional two words totaling only 14 letters to the statute. Unfortunately, the argument, when carried to its logical conclusion, will preclude any categorical waiver of sovereign immunity -- no matter how sweeping -- and invite litigation in every case. Moreover, as is addressed in greater detail below, this argument ignores precedent from this Court upholding penalties in a waiver where there is no explicit mention of the word, and the argument seeks to apply a principle of statutory construction which should not be used to interpret a statutory list beginning with the word "including," as is contained in § 6001.

1. There is no requirement that Congress delineate "penalties" by name in order to waive the federal government's immunity to their imposition.

This Court's recent decision in *Goodyear Atomic Corp.*

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[6]The parenthetical list of "requirements" in RCRA section 6001, 42 U.S.C. 6961, to which the federal government is subject is for all substantive and procedural requirements, "(including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) ...."

v. Miller, 486 U.S. 174 (1988), stands squarely for the proposition that Congress need not expressly include the word "penalties" in order to subject the sovereign to penalties under state law. In *Goodyear Atomic Corp.*, an injured employee, suing under a state workers' compensation scheme, sought a supplemental award above the normal compensation because his injury was caused by the failure of his employer to comply with a specific state safety statute.[7] Although the statute subjecting the federal government to state worker compensation claims did not expressly authorize such additional payments, or penalties, the court found as in this case, that Congress simply subjected the federal government to workers' compensation laws at federal premises "to the same extent as such laws are applied to private facilities."[8] 40 U.S.C. § 290. The fact that immunity from suits for penalties was not specifically waived was of no consequence to this Court, which stated,

> [the contention] cannot be squared with § 290's plain language, which places no express limitation on the type of workers' compensation scheme that is authorized, or with the statute's history, which demonstrates that, at the time of its enactment, a substantial number of States provided additional awards

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[7]Although the workers' compensation award was assessed against a private corporation, the nature of its relationship to the Department of Energy allowed it to assert completely whatever sovereign immunity was possessed by the federal government. The opinion carefully states that its analysis draws no import from the company's private sector nature. 486 U.S. at 180-181, and n. 2.

[8]Although neither the state statute nor the majority opinion characterize the supplemental awards as penalties, it is clear that they are. They substitute for punitive damages and are referred to as penalties no fewer than twelve times in the dissent.

> for violation of safety regulations, a matter of which Congress was presumably aware.

486 U.S. at 183-184.

Similarly, RCRA § 6001 places no limitation on the types of requirements to which the federal government was subject -- only that they be applied to private parties as well. And, Congress was undoubtedly aware of the penalty provisions within RCRA itself, as well as the fact that state statutes would be modeled upon them.

In *Goodyear Atomic Corp.*, this Court pointed out that a workers' compensation statute does not intrude significantly into the mission of the federal agency, and is therefore distinguishable from those involving "direct regulation of the operation" where the state is "claiming the authority to dictate the manner in which the federal function is carried out." 108 S. Ct. at 1710, and n. 3. The Department of Energy cannot reasonably argue that *Goodyear Atomic Corp.* is distinguishable from this case on this basis. Although RCRA **does**, to some degree, dictate the manner in which federal facilities operate by requiring them to obey certain pollution requirements, the states' power to dictate is not created by the penalty provision. As even the Department of Energy concedes in its brief, pp. 35 and 36, Congress has in fact already waived sovereign immunity for injunctive relief, and thereby consented to direct regulation of the manner in which the federal function is carried out, even to the point of shutting down a facility.[9] Having waived its immunity to suit in a manner which includes the potential of

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[9]Although RCRA's waiver of sovereign immunity with respect to injunctive relief carries with it the threat of closing a federal operation completely, amici know of no instance where a state has, in fact, sought such relief through an injunction, much less succeeded in shutting down a federal facility.

direct state intermeddling into federal operations through injunctive relief, it cannot be said that subjecting the federal government to penalties involves any greater interference with control of the federal function. Accordingly, the analysis employed by this Court in *Goodyear Atomic Corp.* applies equally to this case with the same conclusion: the federal government is subject to penalties when it violates state hazardous and solid waste control laws.

2. Congress' use of an exemplary list of "requirements" cannot be interpreted to mean that all items not on the list are implicitly excluded from the universe of "requirements" to which the federal government is subject.

Without so stating, the Department of Energy relies upon the *expressio unius est exclusio alterius* rule of statutory construction in arguing that, since Congress had specifically mentioned reasonable service charges and various other terms in the parenthetical list of § 6001[10], it implicitly excluded all other types of fees or penalties from the potential universe of "requirements." The State of Ohio ably demonstrates that this interpretation does not follow, even if this unarticulated rule of statutory construction is followed. However, the rule is inapplicable. A long line of cases, beginning in this Court, sensibly holds that the *expressio unius* rule of statutory construction should not be used to interpret a statutory list beginning with the word "including." *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125, n.1 (1934); *Highway and City Freight Drivers, et al. v. Gordon Transporters, Inc.*, 576

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[10]The text of the parenthetical list is contained in note 6, supra.

F.2d 1286 (6th Cir. 1978); *Puerto Rico Maritime Shipping Authority v. I.C.C.*, 645 F.2d 1102, 1112, n. 26 (D.C. Cir. 1981). Instead, the list of examples should be construed for what it is -- an illustrative list which is not meant to limit the broad range of "all requirements."

In a variation of the *expressio unius* theme, it is argued that penalties are an enforcement mechanism, as opposed to a "requirement," and, thus, all possible "enforcement mechanisms" were not expressly waived in § 6001. Both the Department of Energy, in arguments below, and the Ninth Circuit in *United States v. Washington*, 872 F.2d 874 (9th Cir. 1989), relied heavily on this distinction. However, in distinguishing "requirements" from "enforcement" mechanisms, one inevitably faces the insurmountable barrier that Congress flatly stated in § 6001 that an enforcement mechanism is in fact an example of a "requirement." Section 6001 explicitly waives immunity as to "all **requirements**, both substantive and procedural (**including** ... provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) ...." 42 U.S.C. § 6961 (emphasis added). On its face, then, Congress clearly contemplated that the word "requirements" includes civil enforcement mechanisms, and any distinction between civil penalties and other "requirements" on this basis is logically untenable.

The evolution of the various sovereign immunity waivers enacted by Congress in the past fifteen years in response to judicial interpretation of such statutes reveals a trend toward increasingly complex "list-like" provisions. (Compare, for example, § 118 of the Clean Air Act as enacted to its subsequent amendments.) Amici discern no tangible evidence that this trend has resulted in any reduction in litigation over the scope of sovereign immunity waivers or any greater consensus as to their meaning. Indeed, a strong

case can be made that the ineluctable effect of overly restrictive judicial interpretation is to cause Congress to enact excessively complex laws which ultimately compel the courts to engage in more, not less, interpretation. In other areas of the law, such as the interpretation of contracts and other legal instruments, modern courts have recognized that giving undue weight to what is not written, as opposed to what is, leads drafters away from plain and simple statements and toward unfathomable legalese. As a result, contemporary courts do not place undue emphasis on what could have been written, but instead attempt to give the full intended meaning to what was written. The Department of Energy's position here runs counter to that philosophy.

III.

IN ORDER TO GIVE MAXIMUM SCOPE TO RCRA'S WAIVER OF SOVEREIGN IMMUNITY, CONGRESS APPROPRIATELY RELIED ON THIS COURT'S FOCUS ON THE WORD "ALL" IN *HANCOCK v. TRAIN*.

This Court's decision in *Hancock* v. *Train*, 426 U.S. 167 (1976), is now a touchstone for any analysis of statutes relating to whether, and to what extent, Congress has subjected the federal government to state regulation in order to effect its stated purpose of achieving environmental compliance. *Hancock* crystallizes the command that waivers of sovereign immunity be "clear and unambiguous," 426 U.S. at 179, and the Department of Energy cites the case for this proposition. Elsewhere in this brief, amici argue that RCRA's waiver with respect to penalties is, in fact, clear and unambiguous. *Hancock* has additional value in the present analysis, beyond the command that a waiver be clear and unambiguous.

Hancock analyzed a phrase remarkably similar to RCRA's § 6001. It involved the question whether federal facilities were required to obtain state permits under § 118 of the Clean Air Act, 42 U.S.C. § 1857, as a condition of operation. Section 118 stated, in relevant part,

> Each department, agency, and instrumentality of ... the Federal Government ... shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

After observing that "[t]here is no longer any question whether federal installations must comply with established air pollution control and abatement measures," this Court phrased the issue succinctly by stating "[t]he question has become how their compliance is to be enforced." 426 U.S. at 172. In determining that these standards could *not* be enforced through a permitting process, the decision focused on the word "all." This Court stated that § 118 was

> "notable for what it does not state .... It does not provide that federal installations 'shall comply with *all* federal state, interstate and local requirements ....' Nor does it state that federal installations 'shall comply with *all* requirements of the applicable state implementation plan.'" 426 U.S. at 182, emphasis in original.

In part because of this omission, no enforcement through permitting requirements was available against the federal government. If there is a lesson in statutory draftsmanship inherent in *Hancock*, that lesson is clear:

Congress should make sure to use the word "all" when it seeks to waive sovereign immunity for all purposes. And, that is precisely what it did in RCRA.

The *Hancock* opinion stresses, and, indeed, is based upon the distinction between **substantive** requirements to be achieved and the **procedure** to obtain compliance. Under *Hancock*, enforcement mechanisms are procedural in nature, and not covered by the limited sovereign immunity waiver drafted by Congress in that case. 426 U.S. at 182-186. In the case now before the Court the penalty provisions in RCRA are also enforcement mechanisms, and, under the *Hancock* analysis, are procedural. Recognizing this, Congress unmistakably expressed its intent that the federal government should be subject to civil penalties by providing a waiver for "all ... requirements, both substantive and procedural ... respecting control and abatement of solid waste or hazardous waste disposal...."

Thus, Congress responded to the second drafting lesson apparent in the *Hancock* opinion: a complete waiver of sovereign immunity should -- as it does here -- cover the universe of substance and procedure. Short of providing an exhaustive and comprehensive list of requirements -- a drafting technique nowhere required in statutory law or case precedent -- Congress did all it could, intelligently and reasonably relying on the *Hancock* analysis, to enact as broad and sweeping a waiver of sovereign immunity as possible.

IV.

RCRA ALSO SUBJECTS FEDERAL DEPARTMENTS AND AGENCIES TO PENALTIES UNDER ITS CITIZEN SUIT PROVISIONS.

Amici agree with and adopt the analysis of the State of Ohio concerning RCRA's citizen suit provisions. In this brief, amici will address only the seeming incongruity that states would seek penalties against the federal government which would then be placed in the federal treasury.

Despite the fact that penalties under RCRA's citizen suit provisions accrue to the federal treasury, amici's interest in being able to seek such penalties is as strong as the Department of Energy's interest in opposing them. Amici have no interest in funding state budgets through penalties derived from federal violations of environmental laws. The plain fact is that penalties increase compliance, and amici seek the ability to obtain federal compliance through use of all tools which Congress has placed at their disposal.

The purse into which citizen suit penalties are placed -- the federal treasury -- does not eliminate the deterrent value they present to the agency, the facility operator or base commander. At a minimum, the responsible official is faced with the prospect of returning to Congress or his budget office to explain why additional funds are needed to accomplish the agency's task. Penalties work on a variety of levels, including pain, inconvenience, and embarrassment. Further, the impact of penalties can still be substantial to the individual agency. Thus, although the deterrent effect might be less than a penalty which removes money from the federal fisc, the deterrent effect remains, and amici urge this court

to give full import to Congress' provision for citizen suits under RCRA against the federal government.

V.

ABSENT AUTHORITY TO ASSESS CIVIL PENALTIES AGAINST FEDERAL FACILITIES, STATES ARE UNABLE TO FULLY ACHIEVE THE OBJECTIVE OF THE CLEAN WATER ACT.[11]

A. Congress has plainly required federal facilities to comply with the Clean Water Act.

The Clean Water Act has as its objective the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). To achieve that objective, Congress set as a national goal the elimination of the discharge of pollutants into the nation's navigable waters by 1985. 33 U.S.C. § 1251(a)(1). Although this aggressive goal has not been met, it signifies Congress' commitment that **all** water pollution be eliminated. Congress granted no special exemption for federal facilities to disregard this national goal.

Unfortunately, federal facilities have not assumed the full responsibility of complying with water pollution control laws. To the contrary, federal facilities have, for decades, lagged far behind nongovernmental facilities in such

---

[11]The amici states concur with Ohio's position that the citizen suit provision of the CWA, § 1365, authorizes states to seek civil penalties against the federal government. For the sake of brevity, however, the amici will only discuss § 1323 of the CWA.

compliance. Recognizing the importance of federal facility compliance to achieve the objective of the CWA, and the failure of federal facilities to comply with water pollution control laws, Congress amended the CWA in 1972 to waive federal sovereign immunity for all federal, state, interstate and local water pollution control laws. 33 U.S.C. § 1323(a). Congress not only directed federal agencies to comply with all water pollution control laws, it expected federal agencies to lead by example:

> This [federal facilities pollution control] section would require every Federal agency with control over any activity or real property to provide national leadership in the control of water pollution in such operations.

S. Rep. No. 414, 92d Cong., 2d Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3733. This federal leadership position has been affirmed by EPA:

> The EPA Administrator has stated that Federal facility compliance with pollution regulations should be a model for the rest of the regulated community and that they should lead the way in minimizing environmental contamination.
>
> EPA Federal Facilities Compliance Manual at I-1.

Federal agencies thus are required to comply with all water pollution control laws completely and expeditiously.

B. Civil penalties provide needed incentive for federal agencies to comply with the water pollution control laws.

Civil penalties are an appropriate and effective enforcement tool that not only penalize for previous violations, but serve as a deterrent against future misconduct. Absent civil penalties, violators have little incentive to comply with the law, knowing that only after they are found in violation will they be required to comply with the law in the future.

The effectiveness of civil penalties as a deterrent makes them a critical element of the CWA's water pollution control program. Congress included civil penalties in the CWA to encourage prompt compliance with its requirements.

> The Committee believes that if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct. Abatement orders, penalty provisions, and rigid access to the Federal District Court should accomplish the objective of compliance.

S. Rep. No. 414, 92d Cong., 2d Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3737.

Throughout the CWA, Congress has made clear the importance of civil penalties in effectuating the goals of the CWA. In section 402 of the CWA, the EPA Administrator is given the authority to deny the approval of a state permit program if the state fails to provide adequate authority "to abate violations of the permit or the permit program,

including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1342(b)(7) (emphasis added). The EPA regulations promulgated under this section **require** the state to possess the ability to assess and recover civil penalties before the EPA will allow a state to administer the CWA program. 40 C.F.R. § 123.27(a)(3) (1990). It is clear that at a very minimum, Congress and the federal agencies consider civil penalties an essential tool in the proper administration of the CWA. Without the ability to invoke civil penalties, a state will be denied all authority to administer the CWA permit program.

The federal government has on previous occasions itself emphasized the importance of civil penalties to the proper administration of environmental laws. In its comments submitted to Congress during its consideration of the Resource Conservation and Recovery Act, the Department of Justice wrote:

> the Department of Justice favors the inclusion of both civil and criminal sanctions for the most effective enforcement of environmental laws. It has been the experience of the Department ... that both sanctions are useful in different situations.

H.R. Rep. No. 1491, 94th Cong. 2d. Sess. 83-84, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6321.

Notwithstanding Congress' 1972 directive that federal agencies comply with all water pollution control laws, federal agencies convinced this Court that the 1972 version of the CWA's waiver of sovereign immunity did not extend to procedural obligations, thereby foreclosing the imposition of civil penalties against federal facilities. *EPA v. California*,

426 U.S. 200 (1976). Without the deterrent value of civil penalties for violations of water pollution control laws, federal agencies continued to ignore these laws. In response to *EPA v. California* and to *Hancock v. Train*, 426 U.S. 167 (1976), Congress quickly amended the CWA, this time to expressly authorize sanctions against federal facilities. 33 U.S.C. § 1323(a). Expressing the purpose of the amendments, the Senate Committee stated:

> This act has been amended to indicate unequivocally that all Federal facilities and activities are subject to **all** of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent. (Emphasis added.)

S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4392. *See Metropolitan Sanitary District of Greater Chicago v. U.S. Department of Navy*, 722 F. Supp 1565, 1569 (N.D. Ill. 1989), *reconsidered in part* 737 F. Supp. 51 (N. D. Ill. 1990) (assessing penalties against federal facilities for CWA violations is entirely consistent with the goals of the CWA to achieve compliance with new standards).

With the 1977 amendments, Congress attempted to dispel any remaining doubts that it expected federal agencies to be subject to sanctions, including civil penalties for the violation of water pollution control laws. Notwithstanding this renewed directive to federal agencies, however, federal agencies continue to ignore Congress' mandate. This continuing disregard of the law is demonstrated in the Department of Energy's brief, p. 32, where it argues that the

United States is not subject to civil penalties at all under the civil penalty provision of the CWA.

Congress authorized civil penalties in the CWA as a deterrent to achieve its goal of eliminating all discharges of pollution into the nation's waters. Given the federal agencies' historic and continued resistance to environmental regulation, it is likely that this goal will not be met if the deterrent of civil penalties is not available against federal facilities. Congress could not have intended this result.

C. Congress assigned to the States the primary responsibility to administer and enforce water pollution control programs under the CWA, and, in furtherance of this scheme, Congress authorized States to assess civil penalties against federal facilities.

Congress intended the states to have the primary responsibility to administer and enforce water pollution control programs under the CWA, limiting EPA's role to the supervision of the states.

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Chapter. It is the policy of Congress that the States manage the construction grant program under this Chapter and

> implement the permit programs under sections 1342 [national pollutant discharge elimination system] and 1344 [dredge and fill] of this title.

33 U.S.C. § 1251(b). Despite this Congressional scheme, states continue to be frustrated at the ongoing failure of federal agencies to comply with the water pollution control laws administered by the states, and with the difficulty states encounter in inducing compliance. This frustration has become more acute because of the current policy of the Department of Justice which prohibits EPA from bringing an enforcement action against a sister agency. Thus, the states alone are left with the responsibility to enforce compliance with water pollution control laws at federal facilities.

The CWA goal of expeditiously eliminating all discharges of pollution would be undermined if Congress exempted federal facilities from compliance with the water pollution control laws. Any absence of state authority to assess civil penalties against federal facilities would have the effect of exempting federal facilities from compliance with these laws, at least until the time the noncompliance is detected. It is illogical to assume that Congress would have pressed the responsibility to administer the quality control program of the nation's waters into the hands of the states without giving them the full arsenal of enforcement alternatives to assure compliance. Significantly, Congress has amended the CWA twice, in 1972 and in 1977, each time to make more clear its intent that federal facilities are not to be immune from the full impact of the CWA and the water pollution control laws arising thereunder. Clearly, Congress intended states to have all the tools required to fully achieve the goals of the CWA. Congress did not omit the necessary component of civil penalties from the states' enforcement

authorities as both the CWA and legislative history prove. Thus, the amici urge this Court to recognize Congress' intent as reflected in the CWA, and hold that 33 U.S.C. § 1323, as well as § 1365, authorize states to assess civil penalties against federal facilities for violations of their water pollution control laws.

CONCLUSION

The decision of the Court of Appeals as it relates to penalties under the general waiver of sovereign immunity contained in RCRA § 6001 should be reversed, and the decision of the Court of Appeals as it relates to the citizen suit provisions for penalties should be affirmed.

The decision of the Court of Appeals as it relates to penalties under the general waiver of sovereign immunity contained in the CWA § 1323 should be affirmed, and this Court is urged to hold that states may impose civil penalties against the federal government under the citizen suit provision of the CWA, § 1365.

Dated: September 13, 1991.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY,
Petitioner,

v.

STATE OF OHIO, et al.,

STATE OF OHIO, et al.,
Cross Petitioners

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR AMICUS CURIAE NATURAL RESOURCES DEFENSE COUNCIL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. CIVIL PENALTIES ARE AN ESSENTIAL COMPONENT OF AN EFFECTIVE REGULATORY SCHEME 3

A. The Role of Civil Penalties to Enforce Hazardous Waste Laws . 3

B. The Track Record of Federal Facility Compliance 5

II. THE RCRA CITIZEN SUIT PROVISION EXPLICITLY WAIVES SOVEREIGN IMMUNITY 7

A. The Plain Language of the Citizen Suit Provision Must Control 7

B. The Legislative History Supports Assessment of Civil Penalties Against Federal Facilities in Citizen Suits 9

III. SECTION 6001 CLEARLY PROVIDES A WAIVER OF SOVEREIGN IMMUNITY 10

A. The Plain Language of Section 6001 Supports Finding A Waiver of Sovereign Immunity 10

B. The Legislative History of RCRA Reflects Congressional Intent to Subject Federal Facilities to Civil Penalties 14

IV. EPA'S APPLICATION OF SECTION 6001 SHOULD RECEIVE DEFERENCE 18

CONCLUSION 19

Table of Authorities

Page(s)

Cases

Canadian Aviator v. United States,
324 U.S. 215 (1945) 13

Chemical Manufacturers Association v.
Natural Resources Defense Council, Inc.,
470 U.S. 116 (1985) 18

EPA v. California, 426 U.S. 200 (1976) 14, 16, 17

Hancock v. Train, 426 U.S. 167 (1976) ..... passim

Leaf v. Hodel, 586 F. Supp. 1163
(E.D. Tenn. 1984) 2

Maine v. Dep't. of Navy, 702 F. Supp. 322
(D. Me. 1988), appeal filed (1st Cir No.
CA86–00211) ..... passim

Ohio v. Dep't. of Energy, 689 F. Supp. 760
(S.D. Ohio, 1988) ..... passim

Ohio v. Dep't. of Energy, 904 F. 2d 1058
(6th Cir. 1990) ..... passim

P.C. Pfeiffer Co. v. Ford, 444 U.S. 697 (1979) 12

Philbrook v. Glodgett, 421 U.S. 707 (1975) 14

Sierra Club v. Lujan, 931 F. 2d 1421
(10th Cir. 1991) 8

United States v. Ohio Barge Lines, Inc.,
607 F. 2d 624 (3d Cir. 1979) 13

United States v. Prescon, 695 F. 2d 1236
(10th Cir. 1982) 8, 9

Page(s)

Statutes and Regulations

Clean Air Act, 42 U.S.C. §7401 et seq.
42 U.S.C. §7418 ..... 4, 14, 15

Comprehensive Response, Compensation and Liability Act, 42 U.S.C. §9601 et seq.
42 U.S.C. §9603(b) 4

Federal Insecticide, Fungicide and Rodenticide Act 7 U.S.C. §136 et seq.
7 U.S.C. §136 3

Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq.
33 U.S.C. §1319 3
33 U.S.C. §1323 16

Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §1401 et seq. 3
33 U.S.C. §1415 4

Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq.
42 U.S.C. §6903 (15) 8
42 U.S.C. §6928 (a) 8
42 U.S.C. §6928 (g) 8
42 U.S.C. §6961 ..... passim
42 U.S.C. §6972 ..... passim

Toxic Substances Control Act, 15 U.S.C. §2601 et seq.
15 U.S.C. §2615 3

40 C.F.R. §270.2 18
40 C.F.R. §271.16 (a) 18
40 C.F.R. §271.2 18

Page(s)

Legislative Materials

Cleanup at Federal Facilities: Hearings on H.R. 3781, H.R. 3782, and H.R. 3783, H.R. 3784, and H.R. 3785 Before the Subcom. on Transportation, Tourism, and Hazardous Materials, 100th Cong., 2d Sess. (1988) (Statement of Roger J. Marzulla, Acting Assistant Attorney General) 4

Cleanup at Federal Facilities: Hearings on H.R. 3781, H.R. 3782, and H.R. 3783, H.R. 3784, and H.R. 3785 Before the Subcom. on Transportation, Tourism, and Hazardous Materials, 100th Cong., 2d Sess. (1988) (Statement of Dan Reicher) 5, 6

132 Cong. Record 14918 (Oct. 3, 1986) 18

H.R. Cong. Rep. No. 830, 95th Cong., 1st Sess. (1977) 15

H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. (1986) 17

H.R. 294, 95th Cong., 1st Sess. (1977) 15

H.R. 14496, 94th Cong., 2d Sess. (1976) 16

S. Rep. No. 67, 102d Cong., 1st Sess. 4 (1991) 5

S. Rep. No. 284, 98th Cong., 1st Sess. 44 (1983) 9

S. Rep. 370, 95th Cong., 1st Sess (1977). 16

S. Rep. No. 414, 92d Cong., 2d Sess. (1972) 4

S. Rep. No. 988, 94th Cong., 2d Sess. (1976) 16

Page(s)

Miscellaneous

Black's Law Dictionary (5th ed. 1979) 13

Webster's Third New Int'l. Dictionary (3d ed. 1981) 11

IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF OHIO, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATEMENT OF INTEREST

This amicus curiae brief is filed on behalf of the Natural Resources Defense Council ("NRDC"), in support of the State of Ohio. A written consent of all parties to the filing of this brief has been obtained and filed with this Court.

NRDC is a national environmental organization with more than 150,000 members and a staff of 175 lawyers, scientists, resource specialists and support personnel. NRDC maintains offices in New York, New York; Washington, DC; San Francisco, California; Los Angeles, California and Honolulu, Hawaii.

This Court's ruling on the issue of civil penalties against federal facilities is of vital importance to NRDC. The organization has long been concerned about safety and environmental problems at federal facilities, particularly those operated by the Departments of Defense and Energy. NRDC has brought enforcement actions under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6972, including cases against Department of Energy (DOE) facilities in Oak Ridge, Tennessee and the Savannah River Plant in South Carolina. In fact, an NRDC case in 1984 established the applicability of RCRA to DOE facilities. See Leaf v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984).

NRDC's experience in enforcing RCRA against federal facilities is that despite the organization's best efforts, and those of other environmental groups and many states, mismanagement of hazardous waste is widespread and continues to represent a serious public health threat. The abatement of environmental violations of federal facilities can only be achieved if all requirements of state hazardous waste laws, both substantive and procedural, are imposed against violating facilities. For this reason, NRDC has a substantial interest in this appeal and urges the Court, for the reasons set forth herein, to adopt the position of the State of Ohio on all issues.

SUMMARY OF ARGUMENT

Congress has strong public policy reasons when it enacted Section 6001 of RCRA, 42 U.S.C. §6961, to enable states, as primary enforcers of RCRA, to seek monetary penalties and thus maintain a credible deterrence against hazardous waste law violations. Enforce-

ment without penalties cannot effectively deter future violations. Without penalties, the enforcement program is simply without serious force and effect, nor is the responsibility for such violations fairly shared throughout the regulated community. Congress plainly waived sovereign immunity from civil penalties for federal facilities both with respect to Section 6001 as well as the RCRA citizen suit provision, 42 U.S.C. §6972. This intent is evident by the plain language and legislative history, as well as the historical context in which Congress considered the compliance record of federal facilities and the obvious need for appropriate penalties.

Finally, the Environmental Protection Agency's ("EPA") implementation of RCRA demonstrates that the agency responsible for implementation of this critical law clearly believes that federal facilities are subject to civil penalties for violations of hazardous waste laws.

ARGUMENT

I. CIVIL PENALTIES ARE AN ESSENTIAL COMPONENT OF AN EFFECTIVE REGULATORY SCHEME

A. The Role of Civil Penalties to Enforce Hazardous Waste Laws

The imposition of civil penalties for violations of federal environmental laws is deeply embedded in this nation's history of environmental enforcement. See, e.g., Clean Water Act, 33 U.S.C. §1319; Toxic Substances Control Act, 15 U.S.C. §2615; Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §1361; Clean Air Act, 42 U.S.C. §7413; Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §1415; Resource Conservation and Recovery Act, 42 U.S.C. §6928; and the Com-

prehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9603(b).

The ineffectiveness of environmental laws absent strong penalties was recognized by Congress as early as 1972, when the Senate Public Works Committee concluded that federal water pollution control statutes prior to 1972 had substantially failed:

> The Committee further recognizes that sanctions under existing law have not been sufficient to encourage compliance with the provisions of [the] Federal Water Pollution Control Act. . . . The Committee believes that if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct. Abatement orders, penalty provisions and rigid access to the Federal District Court should accomplish the objective of compliance.

S. Rep. No. 414, 92d Cong., 2d Sess. 64, reprinted in 1972 U.S. Code Cong. & Admin. News at 8730-31.

The Department of Justice ("DOJ"), while steadfastly opposed to imposition of civil penalties upon federal facilities, frequently relies upon its record of aggressively seeking civil and criminal sanctions for violations of federal environmental law. See Cleanup at Federal Facilities: Hearings on H.R. 3781, H.R. 3782, H.R. 3783, H.R. 3784, and H.R. 3785 Before the Subcom. on Transportation, Tourism, and Hazardous Materials, 100th Cong., 2d Sess. (1988)(Statement of Roger J. Marzulla, Acting Assistant Attorney General). EPA shares the belief that sanctions for non-violators are essential, asserting recently that "penalties serve as a valuable deterrent to

noncompliance and to help focus facility managers' attention on the importance of compliance with environmental requirements." S. Rep. No. 67, 102d Cong., 1st Sess. 4 (1991). Since civil penalties are an important component of the regulatory scheme, exclusion of such sanctions when pursuing federal violators leaves a gaping hole in the environmental compliance program.

B. The Track Record of Federal Facility Compliance

The importance of penalties to coerce compliance is vividly illustrated in the case of federal facilities. By the late 1970's, it had become clear to the Congress that many federal facilities had fallen into serious non-compliance with federal environmental laws. It is not surprising that as a result of the cavalier attitude by federal facilities, a decade later the nation is saddled with billions of dollars in cleanup costs and a substantial threat to the public health. Hearing Before the Subcomm. on Transportation, Tourism, and Hazardous Materials at 174 (Statement of Dan Reicher).

While citizen groups continue to enforce RCRA against the federal government, the practical realities are that without a strong state enforcement presence, comprehensive and effective compliance is difficult if not impossible. Like most major environmental statutes, RCRA contemplates a multi-tiered enforcement scheme with shared authority among EPA, the states and citizen groups. Since the federal government has absented itself from seeking penalties against federal facilities - as illustrated by its opposition in this case - states and citizen groups are left to police violating federal facilities on their own. With severely limited resources, citizen groups depend upon effective and forceful state enforce-

ment programs, which are already overtaxed in their ability to take up where EPA has left off. Id. at 183.

Clearly, citizen suit authority under RCRA was meant to complement, not replace, the state and federal ability to seek strong sanctions against violators. If the state is denied the power to impose civil penalties, non-compliance will continue. In light of a federal government that refuses to act, states are the only governmental entities with effective power and adequate resources to force federal facilities to comply with environmental standards.

The facts in this case dramatically illustrate both the extent of the threat of environmental harm caused by federal facilities as well as the egregious conduct that will remain unabated unless the states have the ability to seek deterrence through penalties. Indeed, the facts of this case are not unique. EPA recently reported, in preliminary federal facility compliance statistics, that 63% of federal treatment, storage, or disposal facilities were found to be in violation of RCRA during fiscal year 1989. S. Rep. No. 67 at 4. During that same time period, 38% of private facilities, clearly subject to penalties under federal and state law, were found to be in violation. Id. This clear disparity illustrates what can occur when penalties are unavailable for an entire class of violations through a double standard of enforcement.

Hazardous waste violations in this case are profound. Without the ability to seek such penalties and abate such violations, a state's enforcement powers will be severely curtailed and a substantial number of serious hazardous waste violations would remain beyond the reach of adequate punishment.

II. THE RCRA CITIZEN SUIT PROVISION EXPLICITLY WAIVES SOVEREIGN IMMUNITY

A. The Plain Language of the Citizen Suit Provision Must Control

As the Sixth Circuit noted below, "Congress clearly waived sovereign immunity for civil penalties in the citizen suit provision of [RCRA]." Ohio v. U.S. Dep't of Energy, 904 F.2d 1058, 1064 (6th Cir. 1990). The plain language of Section 7002, 42 U.S.C. §6972, gives Ohio authority to bring a citizen suit seeking civil penalties to enforce state environmental laws against a federal facility.

Section 7002 provides, in pertinent part:

> . . . any person may commence a civil action on his own behalf -
>
> (1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; . . .
>
> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A)15 . . . as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

42 U.S.C. §6972 (emphasis added).

Since "any person" may bring a citizen suit, and a state is included within the general definition of "person" under RCRA, 42 U.S.C. §6903(15), Ohio may properly bring a citizen suit to enforce its environmental laws against the DOE. Moreover, under Section 7002, the State of Ohio is empowered to seek civil penalties under Section 3008, 42 U.S.C. §§6928(a) and (g). Therefore, the clear language of the statute establishes that federal facilities are subject to suit, including a suit seeking civil penalties under Section 3008, 42 U.S.C. §§6928(a), 6928(g).

Based on the language of Section 3008, the DOE argues that federal facilities are not subject to civil penalties under Section 7002 citizen suits. Petitioner's Brief, Record at 41. The United States is excluded from the definition of "person" subject to civil penalties under Section 3008. See 42 U.S.C. §§6928(a) and (g), 6903(1-5). On this basis, the DOE concludes that federal facilities are not subject to civil penalties under RCRA citizen suits. The DOE's interpretation of Section 7002, however, is at odds with the plain language of the provision.

The DOE's conclusion fails to take into consideration the language and structure of the RCRA citizen suit provision. As noted above, the United States, as well as any government agency, is specifically subject to a citizen suit under Section 7002. "Section 7002 incorporates the civil penalty sections, not vice versa." Ohio v. DOE, 904 F.2d at 1065. As the Tenth Circuit recently recognized in holding the parallel Clean Water Act ("CWA") citizen suit provision applicable to federal facilities on a similar set of facts, "a specific statutory provision will govern notwithstanding the fact that a general provision, standing alone, may include the same subject matter." Sierra Club v. Lujan, 931 F.2d 1421, 1427 (10th Cir. 1991), citing United

States v. Prescon, 695 F.2d 1236, 1243 (10th Cir. 1982). Thus, the specific definition of "person" within Section 7002, which includes the United States, controls over the more general definition of "person" applicable to Section 3008. Based on this analysis, "[t]he fairest reading of [the RCRA citizen suit provision] includes the United States in the application of civil penalties." Ohio v. DOE, 904 F.2d at 1064-65.

B. The Legislative History Supports Assessment of Civil Penalties Against Federal Facilities in Citizen Suits

Although the legislative history concerning Section 7002 is not extensive, it does establish Congressional intent to subject federal facilities to civil penalties under the RCRA citizen suit provision. During the process of amending RCRA in 1984, the Senate Committee stated:

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provision of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States . . .."

S. Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). As the Sixth Circuit noted below, this "statement shows the Senate's intent that civil penalties would be available in a citizen suit against the United States." Ohio v. DOE, 904 F.2d. at 1065.

Consequently, based on the plain language of Section 7002 and legislative history, it is clear that Congress intended to waive sovereign immunity to allow the

recovery of civil penalties in citizen suits against federal facilities.

III. SECTION 6001 CLEARLY PROVIDES A WAIVER OF SOVEREIGN IMMUNITY

A. The Plain Language of Section 6001 Supports Finding A Waiver of Sovereign Immunity

The language of Section 6001 of RCRA, 42 U.S.C. §6961, provides a clear waiver of sovereign immunity. Section 6001 provides, in pertinent part:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.

42 U.S.C. §6961 (emphasis added).

In Ohio v. U.S. Dep't of Energy, 689 F. Supp. 760 (S.D. Ohio 1988), the District Court ruled that the language of Section 6001, considered in the context it was written, provides a sufficiently explicit waiver of sovereign immunity to impose liability upon the United States for civil penalties based on violations of state hazardous waste law. The District Court correctly found a clear waiver of sovereign immunity based on the plain language of the statute. Id. at 764-65.

Use of the language "all . . . requirements" evinces an intent to encompass civil penalties by the very meaning of the word "requirements." The accepted usage of the word "requirement" is "something called for or demanded: a requisite or essential condition"; a "requisite" is something "required by the nature of things or by circumstances or by the end or view: essential, indispensable, necessary." Webster's Third New International Dictionary 1929 (3d ed. 1981). The verb form "to require" means "to impose a compulsion or command upon (as a person) to do something; demand of one that something be done or some action taken: enjoin, command, or authoritatively insist that someone do something." Id.

Civil penalties imposed by a state to enforce state environmental laws "are obviously a form of enforcement requirement intended 'to impose a compulsion or command upon [someone] to do something' as the circumstances may require." Maine v. Dep't of Navy, 702 F. Supp. 322, 326 (D. Me. 1988), appeal filed, (1st Cir. No. CA86-00211). The District Court in Maine v. Dep't of Navy concluded that "civil penalties are clearly encompassed within the language 'all . . . requirements, both substantive and procedural.'" Id. at 327.

The conclusion that civil penalties are included within the term "requirements" is underscored by the parenthetical included in the statute. The parenthetical in Section 6001 is merely an example of such "requirements," and should not be construed to suggest that Congress intended that such sanctions be listed at the exclusion of others. Id. at 327. This interpretation is supported by language in the statute. The court below interpreted the term "including" in the context of Section 6001 to mean that the examples listed are merely illustrative and not exhaustive. Ohio v. Doe, 904 F.2d at 1063, citing P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 at 77 n.7 (1979). Indeed, in drafting the RCRA federal facilities provision, "Congress used comprehensive and encompassing language without limitation: 'all . . . State . . . requirements, both substantive and procedural.' Any first year law student would think that language covered the universe; there is no reason to think that the statutory drafters had any other understanding." Maine v. Dep't of Navy, 702 F. Supp. at 338. Under this reading, civil penalties clearly fall within the meaning of "requirements."

An explicit waiver of sovereign immunity may result from either a detailed accounting of each and every "requirement" that may be imposed upon the federal government or, in this case, by an all encompassing provision that has been properly described as a "single stroke." Id at 327. "It would be nonsensical to require Congress to make a detailed punchlist of all of the 'requirements' set out in the entire body of environmental law of the federal government and each of the fifty states." Id.

Even if the parenthetical in Section 6001 were construed as representing a finite list of "requirements," imposition of civil penalties upon federal facilities would

not be inconsistent with such an interpretation because of the statute's reference to "sanctions." The statute's reference to such "sanctions" in the context of enforcing injunctive relief does not mean that Congress meant that only those types of sanctions are permissible under the section. To the contrary, the commonly understood meaning of "sanctions" includes penalties and fines irrespective of the form of relief sought. See Black's Law Dictionary 1203 (5th ed. 1979) ("sanctions" defined as "part of a law which is designed to secure enforcement by imposing a penalty for its violation . . . ."). Sanctions are set out as an illustration of what the statute means by "requirements."

Finally, courts will interpret statutory language to avoid unreasonable results. U.S. v. Ohio Barge Lines, Inc., 607 F.2d 624, 629 (3d Cir. 1979). Under this rule of statutory construction, the parenthetical cannot represent an exhaustive list of requirements covered by the statute. The statute clearly states that "all requirements, both substantive and procedural" are covered. It is inconsistent with this language to read the parenthetical information as an exhaustive list. "[A]ll requirements" cannot be satisfied by federal facilities adhering to the four listed examples. To preserve the wide array of requirements clearly applying to federal facilities, the statute can only be read in a manner that finds the types of requirements listed in the statute illustrative in nature. Considering this broad grant, the Court must not carve out exceptions and thereby thwart Congress' clear intent. Canadian Aviator v. United States, 324 U.S. 215, 222 (1945).

B. The Legislative History of RCRA Reflects Congressional Intent to Subject Federal Facilities to Civil Penalties

Courts are required to interpret statutes in a manner that honors congressional intent. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). A review of the legislative history of RCRA, as well as an analysis of the historical context of the sovereign immunity issue at the time RCRA was adopted, demonstrates that Congress clearly intended that federal facilities would be subject to all state requirements, including civil penalties.

In June, 1976, the Supreme Court ruled that Section 118 of the Clean Air Act ("CAA"), 42 U.S.C. §7418, did not require federal facilities to comply with state permit requirements governing air emissions. Hancock v. Train, 426 U.S. 167 (1976). At the time Hancock was decided, Section 118 provided that federal facilities must comply "with Federal, State, interstate, and local requirements respecting the control and abatement of air pollution." The Court determined that sovereign immunity was not waived by noting Congress' failure to subject federal facilities to "all Federal, State, interstate, and local requirement." Id. at 182. Likewise, in an accompanying decision, the Court held that the parallel provision in the CWA, providing that federal facilities "must comply with Federal, State, interstate and local requirements," also failed to waive sovereign immunity. EPA v. California 426 U.S. 200 (1976).

In October 1976, shortly after the decisions in Hancock and California, Congress considered, and passed, RCRA. "In reaction to the [Hancock] decision, Congress enacted language [in Section 6001] clearly intended to obviate the effect of the distinction highlighted in the [Hancock] opinion upon an effective comprehen-

sive waiver of sovereign immunity." Maine v. Dep't of Navy, 702 F. Supp. at 327. Recognizing that Court decisions required Congress to be more specific with respect to waiving sovereign immunity for environmental liability for federal facilities, Congress made clear that, under RCRA, federal facilities shall be subject to "all . . . requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal in the same manner and to the same extent, as any person is subject to the such requirements. . . " 42 U.S.C. §6961 (emphasis added).

The following year, in 1977, Congress amended the federal facility provision of the CAA, "intend[ing to] fundamentally overrule the Supreme Court's ruling in Hancock v. Train." H.R. No. 294, 95th Cong., 1st Sess., 12, reprinted in 1977 U.S. Code Cong. & Admin. News 1077, 1089 (emphasis added). Under the amended CAA, federal facilities are subject to "all . . . requirements . . . respecting the control and abatement of . . . pollution in the same manner and to the same extent as any nongovernmental entity." 42 U.S.C. §7418 (emphasis added). As the House report accompanying the 1977 Amendments makes clear, the CAA was amended to ensure that "federal facilities and agencies may be subject to injunctive relief . . . [and] civil or criminal penalties." H.R. No. 294 at 200, reprinted in 1977 U.S. Code Cong. & Admin. News at 1279 (emphasis added).

In 1977, the federal facilities provision of the CWA was also amended "to conform with [the] comparable provision in the Clean Air Act." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess., 93, reprinted in 1977 U.S. Code Cong. & Admin. News 4424, 4468. As amended, the CWA subjects federal facilities to "all . . . requirements . . . respecting the control and abatement of . . . pollution

in the same manner and to the same extent as any nongovernmental entity." 42 U.S.C. §1323 (emphasis added). The Senate report accompanying the 1977 Amendments notes that the Act was amended because "the Supreme Court . . . misconstrued the original intent" of Congress to subject federal facilities and activities "to all the provisions of State and local pollution laws." S. Rep. 370, 95th Cong., 1st Sess., 67, reprinted in 1977 U.S. Code Cong. & Admin. News 4326, 4392.

A careful review of the legislative history of Section 6001 of RCRA underscores the intent of Congress to waive sovereign immunity with respect to civil penalties for federal facilities. When the federal facility provision was first considered by Congress, two bills were proposed. The House Bill, H.R. 14496, 94th Cong., 2d. Sess. (1976), exempted federal facilities from state law and instead subjected such facilities to the exclusive authority of EPA. H.R. No. 1491, 94th Cong., 2d Sess., 49-51, reprinted in 1976 U.S. Code Cong. & Admin. News 6238, 6287. Congress rejected the House Bill, and instead adopted a broader, modified Senate version which provided that federal facilities comply with "all requirements, both substantive and procedural" of both federal and state law. S. Rep. No. 988, 94th Cong., 2d Sess. 23 (1976). When Congress adopted the compromise language, it simply adopted the expansive term "all requirements," thus creating a broad waiver.

In fashioning the language of the RCRA federal facility provision, Congress was aware of the Court's interpretations in Hancock and California. See H.R. Rep. No. 1491 at 45, reprinted in 1976 U.S. Code Cong. & Admin. News at 6283, (stating that "[a]fter several circuit Court of Appeals reached conflicting decisions [regarding the responsibilities of federal facilities to the implementa-

tion of state environmental laws], the United States Supreme Court heard the cases and issued decisions" in Hancock and California). Instead, the language of RCRA requires federal facility to comply with all state requirements. Therefore, the RCRA federal facility provision, as proposed by the Senate and adopted by Congress, was not intended to perpetuate the Supreme Court's restricted interpretation of a state's ability to impose its environmental laws on federal facilities. Instead, the language exhibits a response to the narrow Supreme Court reading and a desire to allow states to impose all environmental controls upon federal facilities.

Finally, Congressional action on federal statutes taken after the adoption of RCRA in 1976 illustrates that Congress intended to enact an explicit waiver of federal facility liability under RCRA. The Conference report to the federal Superfund Amendment and Reauthorization Act of 1986 provides that:

> This clarifies that CERCLA, together with RCRA, requires Federal facilities to comply with all Federal, State and local requirements, procedural and substantive, including fees and penalties, except as provided in Section 121 [of SARA].

H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 242, reprinted in 1986 U.S. Code Cong. & Admin. News 3276, 3335 (emphasis added). Congressional intent to waive sovereign immunity with respect to RCRA was echoed by Senate Majority Leader Mitchell on the Senate floor when addressing the Superfund amendments:

> Section 6001 of the Resource Conservation Recovery Act (RCRA) clearly states that federal agencies are to be "subject to, and comply with, all Federal, State, interstate and local requirements, both substantive and procedural." This Section, together with Section 120 of CERCLA, can leave no doubt that federal facilities are subject to State laws, including State fees and penalties.

132 Cong. Rec. at 14918 (daily ed. October 3, 1986) (Statement of Sen. Mitchell).

The legislative history, considered in its entirety, clearly supports the conclusion that Congress intended Section 6001 of RCRA to waive the sovereign immunity of federal facilities with respect to civil penalties.

IV. EPA'S APPLICATION OF SECTION 6001 SHOULD RECEIVE DEFERENCE

While it is apparent that certain federal agencies, including the Departments of Energy, Defense, and Justice, have taken the position that federal facilities are beyond the reach of the civil penalties provision of RCRA, the Court should show deference to the interpretation of the agency charged with the enforcement of a statute, in this case the EPA. Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985). By regulation, a state hazardous waste program must meet certain minimum requirements to qualify for authorization, including the requirement that states adopt adequate civil penalty requirements. 40 C.F.R. §271.16(a). Such penalties must be available against any "person," defined in the statute to include "a state or federal agency." 40 C.F.R. §§270.2, 271.2 (emphasis added).

In the past, EPA has defined "person" to include federal facilities. For example, in Maine v. Dep't of Navy, EPA referred the Navy's violations of state hazardous waste law to the State of Maine for prosecution under state law for the express purpose of seeking civil penalties for past violations. 702 F. Supp. at 337. By its very conduct in Maine v. Dep't of Navy, EPA takes the position - not shared by DOJ - that states may recover penalties for non-complying federal facilities. The Court should adopt EPA's approach, and recognize the significance of enforcing the laws in an even-handed manner to protect human health and the environment.

CONCLUSION

For the foregoing reasons, NRDC respectfully requests that this Court find that Congress has waived sovereign immunity with regard to the imposition of civil penalties for violations by federal facilities of state hazardous waste laws.

Respectfully submitted,

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